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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO, and PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, A DIVISION OF INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, A MARYLAND CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO, AND PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, A DIVISION OF INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, International Telephone and Telegraph Corporation, prays that a Writ of Certiorari issue to reverse the Decree of the United States Court of Appeals for the Third Circuit entered on August 31, 1967, affirming and enforcing the Order issued by the National Labor Relations Board on June 29, 1966.

Opinions Below

The Opinion of the Court of Appeals (Appendix A, pp. 1a-13a, *infra*) has not been officially reported at the date hereof. The Decision and Order of the National Labor Relations Board (Appendix A, pp. 25a-58a, *infra*) and the Decision of the NLRB Trial Examiner (Appendix A, pp. 59a-100a, *infra*) are reported at 159 N.L.R.B. No. 145.

Jurisdiction

The Decree of the Court of Appeals (Appendix A, pp. 14a-22a, *infra*) was entered on August 31, 1967. On September 25, 1964, the Court of Appeals entered an Order (Appendix A, pp. 23a, 24a, *infra*) denying a Petition for Rehearing timely filed by the petitioner herein. This Court has jurisdiction to review the Decree of the Court of Appeals by Writ of Certiorari under 28 U.S.C. § 1254 (1) and Sections 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 160(e) and (f).

Questions Presented

(1) Whether Section 8(a)(5) of the National Labor Relations Act authorizes the National Labor Relations Board to circumvent Section 9(b)(1) of the Act and the decision of this Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), by ordering bargaining in a mixed unit of professional and non-professional employees where the professional employees have never been accorded the right to a self-determination election guaranteed by Section 9(b)(1) and, in fact, were denied such right in prior Board representation proceedings over the objection of the employer?

(2) Whether the Board may properly order bargaining under Section 8(a)(5) of the Act in a unit invalidly certified by the Board without offering any affirmative proof of the Union's actual majority status?

Statutes Involved

The statutes involved herein, Section 8(a)(5) of the National Labor Relations Act, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5), and Sections 9(a) and (b) of the National Labor Relations Act, 61 Stat. 143 (1947), 29 U.S.C. § 159(a) and (b), are set forth in Appendix B, pages 101a to 102a, *infra.*

Statement of the Case

A. Facts.

Petitioner maintains a plant in Nutley, New Jersey, for the manufacture, sale, and distribution of communications equipment and electronic and related products, including products used in the national defense (Record, p. 9a).[1] Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO (hereinafter referred to as "the Union"), an intervenor below, has heretofore represented various employees of petitioner in three separate bargaining units (145a-146a). The questions presented for review by this petition relate to only one of these units—that generally referred to as the "engineer-technician unit".

In 1951, the Union petitioned respondent National Labor Relations Board (hereinafter referred to as "the Board") for a representation election in this unit, which included both professional and non-professional employees within the meaning of Section 9(b)(1) of the Act. *Federal Tele-*

[1] All references to the record before the Court of Appeals will hereafter be indicated by the prefix "R" followed by the page number in the Appendix filed by petitioner below and with this petition.

communications Laboratories, Inc., 92 N.L.R.B. 1395 (1951) (R423a). In those proceedings, petitioner made timely objection to the mixing of professional and non-professional employees without affording the professionals the right to a self-determination election guaranteed them by Section 9(b)(1) of the Act (R393a-398a). The Board rejected this contention and held—erroneously, in light of *Leedom* v. *Kyne*, 358 U.S. 184 (1958)—that it had discretion to certify a mixed unit whenever the professionals numerically predominated (R429a-430a).

Accordingly, the Board certified the Union as the exclusive representative of the employees in the mixed unit following a run-off election—necessitated because a majority of the employees had supported none of the participants on the original ballot (R391a-392a). Under the compulsion of this certification, petitioner recognized the union in the mixed engineer-technician unit and successive collective bargaining agreements were executed by the parties, the last such having expired on September 9, 1964.

Upon the expiration of that agreement, the Union commenced a strike and work stoppage at petitioner's Nutley installation. On October 7, 1964, a petition seeking the decertification of the Union as the collective bargaining representative of the professional employees in the mixed engineer-technician unit was filed on behalf of a group of professional engineer employees of petitioner (R402a), represented before the Court of Appeals by the Professional Employees of I.T.T. Federal Laboratories, a Division of International Telephone and Telegraph Corporation, which intervened below. Thereafter, the petitioner gave notice to the Union that it was withdrawing its recognition of the Union as the collective bargaining representative of the professional employees in the mixed engineer-technician unit (R366a), and filed two election petitions (R404a-407a), subsequently dismissed by the Board.

B. Proceedings

Following this, the Union filed unfair labor practice charges with the Board alleging that petitioner's withdrawal of recognition violated Section 8(a)(5) of the Act, and in due course, the Regional Director of the Board issued an Amended Complaint thereon (the other then pending Union charges are not directly involved in this petition).

After a hearing on these charges, NLRB Trial Examiner Sidney Sherman rendered a decision in which he dismissed the charge that the petitioner's withdrawal of recognition of the Union in the engineer-technician unit violated Section 8(a)(5) of the Act on the ground that inasmuch as the certification issued by the Board in that unit was issued in violation of Section 9(b)(1), the unit was unlawfully constituted and the certification therein void, and petitioner could not be required by the Board to bargain with the Union as the collective bargaining representative of the professional employees in that mixed unit (pp. 72a-81a, *infra*).[2]

At the hearing before the Trial Examiner, the General Counsel of the Board offered no proof that the Union at any time actually represented a majority of the employees in the unit. This point was pressed by the petitioner before the Court of Appeals, which made no holding thereon. Rather, it merely noted the record testimony that a majority of professional employees in the unit had crossed the Union's picket lines to return to work although something less than a majority of the total number of employees in the entire mixed unit had in fact returned to work—from all of which it presumed that a majority of the employees in the mixed unit desired Union representation.

The Board, by a 3-2 vote, reversed the decision of the Trial Examiner. The majority, while conceding that the

[2] The Trial Examiner also dismissed that portion of the Amended Complaint relating to a merit eview fund applicable to the professional employees in the mixed unit. Should it be determined that petitioner had no bargaining obligation with respect to the mixed unit, this portion of the Decree should also be reversed.

certification had been issued in violation of Section 9(b)(1), thereby rendering it a nullity, held that by their subsequent collective bargaining, petitioner and Union had converted the illegally certified unit into a "consensual" one; that since Section 9(b)(1) directly applies only to representation proceedings, the Board is entitled in proceedings under Section 8(a)(5) to require an employer to bargain respecting a mixed unit notwithstanding it could not have been legally certified under Section 9(b)(1). It held petitioner estopped from now contending that by reason of Section 9(b)(1), the unit is not appropriate.

In their dissenting opinion, Board Members Fanning and Jenkins pointed out "that the 1951 certification is the basis of the entire relationship between the parties and that the limitations within which they governed their entire relationship was and is bottomed exclusively on that certification" (p. 51a, *infra*), and that inasmuch as the 1951 certification was issued in direct violation of Section 9(b)(1) as construed by this Court in *Leedom* v. *Kyne*, *supra*, the Board was without authority, under Section 8(a)(5) of the Act, to compel the petitioner to bargain with the Union in the mixed unit thus unlawfully constituted. With respect to the majority's estoppel argument, the Board minority, after citing *Leedom* v. *Kyne*, *supra*, stated that: "There is no statute of limitations either proscribed [sic] or authorized to be imposed by Section 9(b)(1), nor can the public policy inherent in a self-determination election for professionals be the subject of waiver or estoppel of the parties" (p. 51a, *infra*).

Thereafter, the petitioner timely filed with the United States Court of Appeals for the Third Circuit a Petition for Review of the Decision and Order of the Board, pursuant to Section 10(f) of the Act (R139a), and the Board filed a Cross-Petition for Enforcement of the Decision and Order, pursuant to Section 10(e) of the Act (R143a).

In its opinion, the Court of Appeals, although recognizing that the Board's failure in 1951 to grant a separate election to the professional employees in the mixed unit

violated Section 9(b)(1) and rendered the ensuing certification a nullity, nevertheless enforced the Board's order requiring the petitioner to bargain with the Union in the same mixed unit. The Court, agreeing with the Board majority, held that at some unidentified point the bargaining relationship between petitioner and the Union ceased to be one based upon the void certification and became valid by consent of petitioner and the Union.

Reasons for Granting the Writ

1. The decision of the Court of Appeals below is in direct conflict with the decision of this Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), on an important question of federal labor law as to the authority of the Board, under Section 8(a)(5), to order bargaining in a unit it is prohibited from certifying under Section 9(b)(1) of the Act and thereby to perpetuate the denial of the right of self-determination guaranteed by Section 9(b)(1) and *Leedom* v. *Kyne*.

In *Leedom* v. *Kyne, supra*, this Court held that:

> "Section 9(b)(1) is clear and mandatory. It says that, in determining the unit appropriate for the purposes of collective bargaining, 'the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit'. (Emphasis added.) Yet the Board included in the unit employees whom it found were not professional employees, after refusing to determine whether a majority of the professional employees would 'vote for inclusion in such unit'. Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." (358 U.S. at 188-89)

In the case at bar, the Board and the Court of Appeals have, to all practical effect, circumvented and nullified Section 9(b)(1) and this Court's decision in *Leedom* v. *Kyne* by holding that Section 9(b)(1) limits the powers of the Board only when it acts directly in a representation proceeding under Section 9 of the Act and has no effect whatsoever upon the Board's power to compel bargaining under Section 8(a)(5) of the Act.

They have done this by introducing the novel concept of a "consensual unit" created by the petitioner and the Union as distinguished from a "certified unit" created by the Board, and arguing from their self-created premise that the Board is unrestricted in its power to require the petitioner to bargain with the Union in such a "consensual unit".

However, the Board and the Court of Appeals have pointed to no provision in the Act justifying either the theory that the mandatory limitations in Section 9(b)(1) apply only in representation proceedings or the attempted distinction between "consensual" and "certified" units.[3] The theory is in direct conflict with the Board's own past holdings that a Section 8(a)(5) bargaining order is tantamount to a certification in that both look to a future exclusive bargaining relationship, and that the Board lacks the power to require an employer to bargain with a union it cannot certify. *Cf. Marshall & Bruce Co.*, 75 N.L.R.B. 90, 95-96 (1947). (In any event, the theory has no applicability to the case at bar, for the mixed unit in this case was established by the Board in the 1951 representation proceedings which the Board and the Court of Appeals have both conceded were conducted in direct violation of the mandatory

[3] The only authority cited in support of this distinction is the Board's own decision in *Retail Clerks Union Local 324 (Vincent Drugs)*, *supra*, the facts of which are quite inapposite to those of the case at bar, since the Board was concerned there merely with the validity of a union security clause in a contract entered into by the parties, without prior Board certification, and not with the issuance of an order compelling bargaining under Section 8(a)(5) or with a unit certified by the Board.

limitations imposed upon the Board by Section 9(b)(1) as construed by this Court in *Leedom* v. *Kyne, supra.*[4])

The irreconcilability of this theory with this Court's decision in *Leedom* v. *Kyne, supra,* becomes manifest in light of the fact that Section 8(a)(5) of the Act expressly makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*" (emphasis added), and that Section 9(b)(1) directly qualifies and delimits the appropriate unit concept which lies at the heart of Section 9(a). Thus, it is squarely inconsistent with the express provisions of the Act—and, as well, the prior decisions of the Board[5] for the Board and

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[4] If it proves anything, the fact, cited by the Board and the Court of Appeals, that the petitioner and another union had bargained in a mixed unit even before the invalid 1951 certification proceedings demonstrates the lack of any justification for a departure from the mandatory *Leedom* v. *Kyne* rule, inasmuch as the original Board decision in *Westinghouse Electric Corp.*, 115 N.L.R.B. 1420 (1956), from which *Leedom* v. *Kyne* directly arose, clearly shows a history of mixed-unit bargaining of some ten years in that case. That fact, however, did not prevent this Court for enforcing Section 9(b)(1) against the Board.

[5] The Board itself has recognized that the limitations imposed by Section 9(b) of the Act upon its freedom to determine the appropriateness of a given unit are equally limitations upon its authority to issue bargaining orders under Section 8(a)(5). In *Mack Manufacturing Corp.*, 107 N.L.R.B. 209 (1953), for example, the Board held that it was barred by the prohibition in Section 9(b)(3) against the commingling of guards with other employees in a single unit from issuing an order under Section 8(a)(5) compelling bargaining in such a unit. The decision is sound and consistent with the intent of the Act. It is the Board's apparent distinction herein between the prohibition in Section 9(b)(3) and that in Section 9(b)(1) which is unsound. To the same effect is the decision of the Court below in *NLRB* v. *American District Tel. Co. of Pa.*, 205 F. 2d 86 (3rd Cir. 1953); also *cf. Marshall & Bruce Co., supra.*

the Court of Appeals to say that the Board may accomplish, through a bargaining order issued under Section 8(a)(5), what Section 9(b)(1) prohibits it from doing directly, thereby nullifying the mandatory prohibition imposed upon the Board by Congress in Section 9(b)(1), as construed and implemented by this Court in *Leedom* v. *Kyne, supra.*

This inherent conflict with Section 9(b)(1) and *Leedom* v. *Kyne* is heightened by the Board's application of a theory of constructive estoppel against petitioner for doing that which the Board's own certification commanded. As Board Members Fanning and Jenkins pointed out below, the effect of this Board theory is to create by administrative fiat a statute of limitations never authorized by Congress. *Cf. NLRB* v. *Katz,* 369 U.S. 736, 748, n. 16 (1962). Moreover, inasmuch as the rights which Congress, in Section 9(b)(1), and this Court, in *Leedom* v. *Kyne,* sought to protect are those of the professional employees, no estoppel of petitioner can logically operate to confer upon the Board the affirmative authority to compel a bargaining relationship in derogation of the self-determination rights of such employees.

It is precisely such authority, however, that the Board has assumed herein, with the effect of frustrating the professional employees' exercise of their right to self-determination under Section 9(b)(1) and *Leedom* v. *Kyne,* and, in effect, locking them indefinitely in a mixed unit from which they have sought and thus far been denied escape. If this result is sanctioned in this case, the same effect can follow in countless other mixed units of professional and non-professional employees.

Petitioner respectfully submits that the question of the right of the Board to assume such authority in any case, and thereby to accomplish through Section 8(a)(5) an end result expressly prohibited by Section 9(b)(1) and *Leedom* v. *Kyne,* is one which merits the full consideration of this Court.

2. The decision below is erroneous for the further reason that the Board's bargaining order herein was entered in the absence of any prior valid certification or any proof whatsoever of the Union's majority status.

As the Board itself has stated, "A prerequisite to finding that the Respondent violated Section 8(a)(5) of the Act, is proof that the Union in fact represented a majority of the Respondent's employees at the time it requested bargaining. The burden of so proving rests, of course, upon the General Counsel." *Kenneth A. Zick, d/b/a United States Molded Shapes,* 141 N.L.R.B. 357, 359 (1963); see also *Stoner Rubber Co., Inc.,* 123 N.L.R.B. 1440, 1445 (1959).

In the case at bar, the General Counsel of the Board offered no proof whatsoever that the Union at any time represented a majority of employees in the engineer-technician unit.[6] Inasmuch as the Board has now acknowledged that "the [1951] certification no longer has any efficacy" (p. 39a, *infra*), and the Court of Appeals itself has declared the illegality and invalidity of the 1951 election and certification proceedings, thereby precluding any presumption of majority status upon which the Board can rely.

It is, of course, paradoxical for the Board to seek majority status in the very certification it has subordinated to its "consensual unit" theory in order to justify its circumvention of Section 9(b)(1) and *Leedom* v. *Kyne, supra.* In any event, such a theory cannot remedy the Board's failure to allege and prove the actual existence of a majority. As this Court pointed out in *International Ladies'*

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[6] The mere negative fact that something less than a majority of employees in the unit had returned to work at the time the petitioner withdrew its recognition of the Union cannot serve as an affirmative showing of majority representation. *Norlee Togs, Inc.,* 129 N.L.R.B. 14 (1960); *United Transports, Inc.,* 123 N.L.R.B. 668, 680 (1959); *McGough Bakeries Corp.,* 58 N.L.R.B. 849, 853 (1944).

Garment Workers' Union v. *NLRB*, 366 U.S. 731 (1961), consensual recognition of a union by an employer, even when granted in good faith, creates neither majority status nor a presumption thereof absent proof of prior majority status, even where the Union clearly attained majority status thereafter.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16012

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, A MARYLAND CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO,

Intervenor,

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, A DIVISION OF INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Intervenor,

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 28, 1967

Before: HASTIE and SEITZ, *Circuit Judges;* and BODY, *District Judge.*

OPINION OF THE COURT

(Filed July 31, 1967)

By HASTIE, *Circuit Judge.*

This case is here on a petition by International Telephone and Telegraph Corporation to review, and a cross-petition by the National Labor Relations Board to enforce,

a decision and order of the Board. 159 N.L.R.B. No. 145. The Board found that the petitioner had committed unfair labor practices within sections 8(a)(5) and (1) of the National Labor Relations Act,[1] (1) by withdrawing recognition from and refusing to bargain with Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, as representative of the professional employees in the engineer-technician unit, (2) by refusing to disclose to the union certain data necessary to the union in the performance of its role as bargaining agent, and (3) by entering into and conducting negotiations with a determination to avoid an agreement. The Board also found that the petitioner had violated section 8(a)(1) of the Act by unlawfully employing threats and promises in soliciting two striking employees to abandon the strike. Accordingly, the order here in controversy was issued requiring the petitioner to cease and desist from these practices and to take appropriate affirmative action, including posting of notices.

In 1951, Local 400 petitioned the Board for a representation hearing to be conducted within the framework of three theretofore-recognized bargaining units of the petitioner's employees; a shop-maintenance unit, a clerical-drafting unit, and an engineer-technician unit. A dispute arose whether the technicians in the engineer-technician unit were professional employees within the terms of the Act and thus should be included in that unit. The Board

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[1] 29 USC § 158

(a) It shall be an unfair labor practice for an employer—

(1) to interefere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

ruled that the technicians were properly so included, whether "professionals" or not, because of the similarity of working conditions, integration of work and parallel bargaining history of the technicians and the engineers. The Board also found that professional employees constituted a majority of workers within the unit regardless of classification of the technicians. *Federal Telecommunications Laboratories, Inc.*, 1951, 92 N.L.R.B. 1395.

At that time, the policy of the Board was to deny professionals a separate vote as to their choice of a collective bargaining representative where they constituted a majority of such a mixed unit. Thus, although the engineer-Technician unit selected Local 400 as its bargaining representative, no separate vote was ever held among the engineers, despite the petitioner's objection. This was in contravention of section 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1), which reads in part: "The Board shall not ... decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

Local 400 was granted recognition and collective bargaining ensued. Thereafter, for thirteen years the petitioner maintained a continuous bargaining relationship with the union as the representative of each of the three units. Bargaining agreements were executed in 1951, 1952, 1954, 1956 and 1959. A Strike Settlement Agreement was entered into in 1961 and expired in September, 1964. Upon failing to reach a new agreement with the petitioner, the union struck on September 9, 1964. Although negotiations continued, no accord was reached.

At this juncture, for the first time since 1951, the representative status of the union was challenged. On October 7, the professional employees filed a decertification petition

with the Board, requesting that engineers and chemists no longer be represented by Local 400. One day later, the petitioner filed election petitions for both the mixed unit and the professional employees. At the same time, it notified the union that it was withdrawing recognition from Local 400 as bargaining representative of the professional employees. On October 9, Local 400 filed unfair labor practice charges with the Board alleging the Petitioner's refusal to supply certain data which the union considered necessary for proper collective bargaining and also averring the petitioner's intent to avoid agreement. These charges were later amended to allege as additional wrongs the petitioner's withdrawal of recognition of the union as the representative of the professional employees and certain threats and promises made by the petitioner to specific striking professional employees.

The Board dismissed the election petitions on the ground that they could not be considered pending disposition of the unfair labor practice charges. Thereafter, the Board handed down the Decision and Order contested here.

WITHDRAWAL OF RECOGNITION OF THE UNION

The Board found that the petitioner's withdrawal of recognition of the union as representative of the professional employees violated sections 8(a)(5) and (1) of the Act. In reaching its decision, the Board assumed that the failure to provide a separate election for the professional employees in 1951 made that election illegal. See *Leedom* v. *Kyne*, 1958, 358 U.S. 184. But to concede that point is not to say that every unit composed of professionals and non-professionals originally formed without a separate election is invalid forever. Though section 9(b)(1) prohibits the Board from designating a mixed unit without holding the requisite election of professionals, nothing in the language of the Act prohibits the relevant parties from

maintaining and recognizing such a unit consensually. *Retail Clerks Union Local 324* (*Vincent Drugs*), 1963, 144 N.L.R.B. 1247. In our view such a consensual arrangement is presented here. At no time between 1951 and 1964 did either the petitioner or the professional employees challenge the unit or seek its decertification. The petitioner could have brought the question of alleged improper certification to a head immediately by refusing to bargain in 1951 and litigating the issue before the Board and the courts in an unfair labor practice proceeding. More significantly, even after the 1958 decision in *Leedom* v. *Kyne*, *supra*, which put the parties on notice that the original certification was made in error, they negotiated and entered into new contracts in 1959 and 1961 without questioning the composition of the unit. The Board reasonably found that this conduct constituted consent on the part of both parties to a mixed bargaining unit consisting of professional and non-professional employees. The rationality of that conclusion is further supported by the fact that even before 1951 an engineer-technician group had existed and had functioned as a consensual unit for collective bargaining between the petitioner and the union which then represented the employees. In these circumstances, the error in the original determination of the bargaining unit does not justify the present refusal to bargain with it.[2]

Nor can it be said that the petitioner's refusal to bargain was grounded on and justified by good-faith doubt as to the union's majority within the existing unit. At the time recognition was withdrawn 216 of the 345 engineers

[2] The Board was careful to point out, in footnote 15 of its opinion, that its "holding here is not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time . . . ; now is not an appropriate time because of the Respondent's unremedied unfair labor practices."

had returned to work, but more than a majority of the engineer-technician unit remained on strike. And, as the petitioner has admitted, the filing of a decertification petition by a group within a recognized union is not a valid excuse for refusal to bargain with that union. The Board permissibly found that the petitioner's refusal to bargain with Local 400 as representative of the entire group of employees in the engineer-technician unit constituted an unjustified disruption of the bargaining process violative of sections 8(a)(5) and (1).

FAILURE TO DISCLOSE DATA

The bargaining history prior to the strike of September 9, 1964, discloses that the issue of labor costs, especially fringe benefits, was of vital concern to both the petitioner and the union. The petitioner continually maintained that in order for it to remain "competitive" the cost of fringe benefits must be reduced, and that contracts were being lost because the fringe benefit costs of its competitors were lower. The union requested data showing the relation between fringe benefits and bidding for new contracts and information showing the contracts that had been lost because of high fringe benefit costs. The petitioner suggested that the union "write a letter to the company, and they would give it to counsel for review". Although no letter was written until October 13, four days after the unfair labor practice charges were filed, the petitioner persisted in its refusal to disclose any financial data regarding its competitive position and corresponding labor costs.

Good-faith bargaining requires that relevant factual statements made during the course of collective bargaining be supported, on request, by available proof as to their accuracy. *NLRB* v. *Truitt Manufacturing Co.*, 1956, 351 U.S. 149. Certainly it cannot be contended that the in-

formation sought by the union was irrelevant to its function as bargaining agent. Indeed, the petitioner does not deny relevancy. In our view, failure to honor the request for disclosure of relevant data in this case was a clear violation of the Act. *Puerto Rico Telephone Co.* v. *NLRB*, 1st Cir., 1966, 359 F.2d 983; *Curtiss-Wright Corporation, Wright Aeronautical Division* v. *NLRB*, 3d Cir., 1965, 347 F.2d 61.

We have considered the petitioner's argument that the union's failure to put its request for information in writing until after the unfair labor practice charges had been filed shows that the earlier oral requests for such data were not made in good faith and were merely "to set the Company up" for an unfair labor practice charge. This argument is without merit. No rule requires that requests for information be in writing. The fact that no letter was written until October must be considered in the light of various delaying tactics employed by the petitioner, among them a promise that the company comptroller would come to a bargaining session to answer questions pertaining to financial data. The comptroller never appeared.

Finally, the petitioner did not meet its obligation of disclosure by providing some of the requested data. The petitioner was obliged to make full disclosure of the data upon which its assertions were based. *NLRB* v. *Western Wirebound Box Co.*, 9th Cir., 1966, 356 F.2d 88; *Curtiss-Wright Corporation* v. *NLRB, supra.*

FAILURE TO DISCLOSE BLANKET SENIORITY INFORMATION AS TO NON-UNIT EMPLOYEES.

Under the terms of the collective bargaining agreement, employees not within the bargaining unit could, under certain circumstances, be transferred into the unit, receiving seniority credit for time not within the unit. Thus, the transfer of a non-unit employee could conceivably

"bump" a unit employee down the seniority ladder. In fact, such a situation occurred in December of 1963. The union thereafter requested information regarding seniority status of the transferred employee as well as blanket seniority information as to other employees eligible for transfer into the unit. The company stipulated that the only information the union would receive would be as to employees already transferred, and that this information would be published in the company's semi-monthly personnel bulletin. This publication was distributed two months after the transfer. The union's request for blanket seniority information was not met until October of 1964. The Board found that failure to provide this information for a nine-month period violated sections 8(a) (5) and (1).

The major question here is whether such information was relevant to the performance of the union's obligations under the Act. We have concluded that knowledge of seniority data of non-unit personnel before their transfer into the unit was imminent has not been shown to have been relevant to the union's performance of its duties. We realize, of course, that a union is entitled to information necessary to prosecute grievances. *NLRB* v. *Acme Industrial Co.*, 1967, 385 U.S. 432. But we see no reason why the petitioner's disclosure obligation cannot be met by furnishing seniority data of an individual non-unit employee shortly before his transfer into the unit. Imparting individual seniority data at this time would not place the union in any worse position than it would be if it was permitted to obtain comprehensive data for all employees eligible before any transfers were contemplated.

Similarly, it has not been established that the union needed such information in order to "administer" the collective bargaining agreement. The Board theorizes that without such information the union cannot perform its

function of "counselling and advising unit employees of their rights and status under the contract". But it is not indicated how the rights and status of an employee might be affected before a transfer into the unit should become imminent. Indeed, since transfer cannot occur until certain conditions precedent are met, long-range predictions of transfers must be speculative.

The cases cited to us by the Board for the proposition that the union is entitled to blanket seniority information are inapposite. *NLRB* v. *Gulf Atlantic Warehouse Co.*, 5th Cir., 1961, 291 F.2d 475; *Boston Herald-Traveler Corp.* v. *NLRB*, 1st Cir., 1955, 223 F.2d 58; *NLRB* v. *New Britain Machine Co.*, 2d Cir., 1954, 210 F.2d 61. In those cases, requests for seniority data, limited to unit employees, were linked to wage claims, and thus were "presumptively relevant." *Curtiss-Wright Corporation* v. *NLRB, supra; Boston Herald-Traveler Corp.* v. *NLRB, supra.* No wage claims supported the demand for blanket seniority data here and the demand covered non-unit employees.

In these circumstances and on the present record we hold that the petitioner's failure for a nine-month period to disclose blanket seniority information concerning non-unit employees who might, at some undetermined time in the future, be transferred into the unit was not an unfair labor practice. However, the union is entitled to be informed of the seniority status of a non-unit employee about to be transferred in order that it may detect possible contract infractions and, if appropriate, institute grievance procedures. We leave open the question whether, on a different showing blanket seniority data for non-unit employees must be supplied.

REFUSAL TO DISCLOSE MERIT-REVIEW EVALUATION DATA.

The collective bargaining agreement provided for merit increases for professional employees. The total sum to

be used for such increases was divided into two parts. Two-thirds of it was to be allocated upon the basis of company recommendations as to recipients and the amount each was to receive. Discussions as to these recommendations between the petitioner and the union were mandatory. If the parties could not agree, the company had the right to put its proposals into effect unilaterally. As to the second part, consisting of the remaining one-third of the total, a board composed of both union and company representatives was to "review" recommendations forwarded by the union. Unresolved disputes as to allocation of this portion of the fund were to be submitted to arbitration.

The union demanded disclosure of the factors that the petitioner had used in recommending distribution of the first two-thirds of the fund. The petitioner refused to comply with this request. The Board ordered the petitioner to turn over such information. We agree that such data should have been provided.

Since merit payments are in fact "wages," information relating to such payments is "presumptively relevant." *Curtiss-Wright Corporation* v. *NLRB, supra.* The union, under the terms of the collective bargaining agreement, had the right to discuss the recommendations of the petitioner in an effort to influence the petitioner's judgment. We do not see how this prerogative could be exercised effectively without knowing the basis of the petitioner's suggestions. Moreover, the union was entitled to be advised of these factors as a guide to the exercise of its right of recommendation as to the remaining one-third portion of the fund.

The petitioner claims that the union waived its right to such information, citing for this proposition certain bargaining history. Under the 1959 collective bargaining agreement, the petitioner was required to furnish the union with blank evaluation sheets used by the petitioner in preparing recommendations for merit increases. Later bar-

gaining contracts did not require that these sheets be turned over. The petitioner views this as a contractual waiver of the right of the union to have access to revelant data.

Waiver of a statutory right to information, within the provisions of section 8(d) of the Act, 29 U.S.C. § 158(d), must be in "clear and unmistakable language". *Timken Roller Bearing Co.* v. *NLRB*, 6th Cir., 1963, 325 F.2d 746, *cert. denied* 376 U.S. 971. Silence in the bargaining agreement is insufficient to constitute such waiver. Thus, the petitioner will be required to turn over the data relied upon in recommending allocation of the two-thirds portion of the merit fund when the union so requests.

BAD FAITH BARGAINING WITH INTENT TO AVOID AGREEMENT

The Board found that the petitioner violated sections 8(a)(5) and (1) of the Act "by entering into and conducting negotiations with a fixed determination to avoid, rather than reach, an agreement. This court must determine whether that finding is supported by substantial evidence on the entire record. 29 U.S.C. § 160(e).

The Board points initially to two incidents involving Carey, the petitioner's labor relations manager, and LaGana, one of the union's chief stewards. In March of 1964, during a conference concerning the resolution of grievances, Carey and LaGana became involved in a disagreement as to the substance of a grievance. Carey told LaGana that LaGana was "completely and absolutely unreasonable, that the union contract had clauses that management could no longer live with, and in fact, that the company was preparing a set of proposals of such a nature that it would take a fourteen week strike to condition . . . [the union] to accept them, and if Mr. LaGana was on the committee, it would take a twenty-eight week strike". During a subsequent argument Carey replied in the affirmative to LaGana's question "you mean you are sending out pro-

posals just like you told us . . . and you are going to put us out in the street for fourteen weeks?"

As the trial examiner found, negotiations over the new contract followed the course Carey had predicted. The petitioner proposed large reductions in fringe benefits, yet, as previously pointed out, refused to substantiate the contention that such reductions were needed in order to maintain its competitive position. Even when the petitioner reduced some of its demands, other were retained as "musts", manifesting a "take-it-or-leave-it" attitude. The dropping of some demands was conditioned on union acceptance of others "if there was no strike".

The petitioner maintains that the events relied upon by the Board are isolated, at most show a "give and take" attitude, and do not show an overall intent to avoid agreement within the meaning of *NLRB* v. *Katz*, 1962, 369 U.S. 736. From the record we cannot say that the Board was arbitrary in its finding. Although we, like a minority of the Board, might have reached a different conclusion given the same facts, our power of review is not such that we may, on the present record, reverse the decision of the Board as inadequately supported by the evidence.

Solicitations of Two Striking Employees to Return to Work

It is undisputed that the petitioner's laboratory director solicited two striking engineers to return to work. Such solicitations were accompanied with promises such as "the company would remember its loyal employees at merit review time" and "if you are one of the first employee(s) to come in during the strike you can expect a raise and a promotion".

The petitioner claims that such events are unrelated to any other unfair labor practice finding and, therefore, no remedial order is warranted. But it is not necessary that

such occurrences be related to other unfair labor practices. *International Ladies Garment Workers Union, AFL-CIO and Twin-Kee Manufacturing Co., Inc.*, 1961, 130 N.L.R.B. 614. And even if such a requirement existed it could not be found on this record that these solicitations were unrelated to the petitioner's withdrawal of recognition from the union as representative of the professional employees. The Board's finding as to illegal solicitation must be upheld.

So much of the Board's order as requires the disclosure of blanket seniority data of non-unit personnel will be set aside. The remainder of the order will be enforced.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Decree of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,012

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland Corporation,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO,

Intervenor,

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, A Division of International Telephone and Telegraph Corporation,

Intervenor.

DECREE

Before:

HASTIE and SEITZ, *Circuit Judges;* and
BODY, *District Judge.*

THIS CAUSE came on to be heard upon a petition to review, and a cross-petition to enforce an order of the National Labor Relations Board, dated June 29, 1966, against International Telegraph and Telephone Corporation (ITT Federal Laboratories). The Court heard argument of

Decree of the United States Court of Appeals for the Third Circuit

respective counsel on March 28, 1967, and has considered the briefs and transcripts of record filed in this cause. On June 31, 1967, the Court, being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Third Circuit that International Telegraph and Telephone Corporation (ITT Federal Laboratories), its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, as the exclusive representative of Petitioner's employees in the engineer-technician bargaining unit and the bargaining units set forth in Appendices B and C attached hereto.

(b) Refusing to disclose to the aforesaid labor organization the merit review evaluation data relied upon the Petitioner in allocating the two-thirds portion of the merit fund to professional employees in the engineer-technician bargaining unit.

(c) Refusing to disclose to the aforesaid labor organization such data as Petitioner relied, or may have relied, upon in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive status or has caused it to lose competitive contracts.

(d) Offering strikers special inducements to return to work and threatening them with loss of benefits if they do not return.

(e) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist labor organizations, including the above Union, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, with respect to the terms and conditions of employment of the employees in the engineer-technician unit and in the units described in Appendices B and C, attached hereto, and if an understanding is reached, embody it in a signed agreement.

(b) Upon request, make available for inspection by the aforesaid labor organization the merit review evaluation data relied upon by it in allocating the two-thirds portion of the merit fund to professional employees in the engineer-technician bargaining unit.

(c) Upon request, make available for inspection by the aforesaid labor organization such data as it relied, or may have relied upon in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive status or has caused it to lose competitive contracts.

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(d) Post at its plant in Nutley, New Jersey, copies of the attached notice marked Appendix "A". Copies of said notice, to be furnished by the Regional Director for Region 22 (Newark, New Jersey), shall, after being duly signed by an authorized representative of the Petitioner, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree, what steps have been taken to comply herewith.

By the Court

WILLIAM H. HASTIE
Circuit Judge

Dated: August 31, 1967

Decree of the United States Court of Appeals for the Third Circuit

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals, enforcing in part an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL bargain collectively, upon request, with Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, as the exclusive representative of our employees in the engineer-technician unit and in the shop-maintenance and clerical-drafting units with respect to rates of pay, wages, and hours of employment, and other conditions of work, and, if an understanding is reached, embody it in a signed agreement.

WE WILL DISCLOSE to said labor organization, upon request, all data in our possession on which we relied or may have relied in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting our competitive position or causing us to lose competitive contracts.

WE WILL NOT offer to strikers special inducements to return to work or threaten them with loss of benefits if they do not return.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing,

and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

INTERNATIONAL TELEPHONE & TELEGRAPH CORP.

By .....

Dated .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102 (Tel. No. 645-3088).

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APPENDIX "B"

(Clerical-Drafting Unit)

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Buyer "A"
Buyer "B"
Buyer "C"
Planner "A"
Planner "B"
Planner "C"
Technical Clerk "A"
Technical Clerk "B"
Photographer "A"
Photographer "B"
Photographer Helper "A"
Photographer Helper "B"
Secretary
Stenographer "A"
Stenographer "B"
Typist "A"
Typist "B"
Vari-Typist "A"
Vari-Typist "B"
Statistical Typist
Clerk Reproduction "A"
Clerk Reproduction "B"
Clerk Reproduction "C"
Clerk "A"
Clerk "B"
Clerk "C"
Junior Clerk
Telephone Operator
Senior Designer
Designer

Decree of the United States Court of Appeals for the Third Circuit

Layout Draftsman "A"
Layout Draftsman "B"
Detailer
Detailer-Trainee
Senior Designer—Telephone
Designer—Telephone
Technical Illustrator (Artist) Senior
Technical Illustrator Senior
Technical Illustrator (Artist)
Technical Illustrator

APPENDIX "C"

(Shop-Maintenance Unit)

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Sr. Laboratory Mechanic
Exp. Tool & Die Maker
Exp. Machinists
Machinists "A"
Machinists "B"
Inspector "A"
Inspector "B"
Exp. Glassblower
Glassblower "A"
Glassblower "B"
Exp. Engraver
Exp. Sheetmetal Worker
Sheetmetal Worker "A"
Sheetmetal Worker "B"
Sheetmetal Worker "C"
Exp. Painter
Exp. Welder

Welder "A"
Exp. Assembler—Mechanical
Assembler "A"—Mechanical
Exp. Assembler—Vacuum Tube
Mounter Assembler
Mounter Assembler "B"—Vacuum Tube
Exhaust Operator "A"
Exhaust Operator "B"
Wireman "A"
Wireman "B"
Wireman "C"
Inspector Equipment
Inspector Tester—Transformer
Wireman and Transformer Workers
Inspector—Process
Inspector—Receiving
Stock Clerk "A"
Stock Clerk "B"
Receiving and Shipping Clerk
Warehouseman
Carpenter "A"
Carpenter "B"
Electrician "A"
Electrician "B"
Plumber Mechanic "A"
Plumber Mechanic "B"
Maintenance Mechanic "A"
Maintenance Mechanic "B"
Machine Repairman
Painter "A"
Painter "B"
Maintenance Helper
Cleaner
Chauffeur
Chauffeur's Helper
Aircraft Mechanic
Potter
Helper, Laboratory

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,012

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland Corporation,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO,

Intervenor,

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, A Division of International Telephone and Telegraph Corporation,

Intervenor.

SUR PETITION FOR REHEARING

Present:

STALEY, Chief Judge; and McLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges*; and BODY, *District Judge.*

The petition for rehearing filed by International Telephone and Telegraph Corporation, a Maryland Corporation, Petitioner, in the above entitled case having been submitted to the judges who participated in the decision

of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WILLIAM H. HASTIE,
Circuit Judge.

Dated: September 25, 1967.

Decision and Order of the National Labor Relations Board

(In Cases Nos. 22-CA-2015, 22-CA-2131 and 2-RC-2282)

D-8775

159 NLRB No. 145 Nutley, New Jersey

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION (ITT FEDERAL LABORATORIES)[1]

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO.

Cases Nos. 22-CA-2015, 22-CA-2131

PROFESSIONAL EMPLOYEES OF I. T. T. FEDERAL LABORATORIES, a Division of INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Petitioner,

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Union.

Case No. 2-RC-2282[2]

On April 15, 1965, Trial Examiner Sidney Sherman issued his Decision in cases numbered 22-CA-2015 and

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[1] The Respondent's name appears in the caption as amended at the hearing.

[2] For purposes of decision, we have consolidated Case No. 2-RC-2282 with Cases Nos. 22-CA-2015 and 22-CA-2131.

22-CA-2131, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the General Counsel, the Respondent, and the Charging Party filed exceptions to the Trial Examiner's Decision, together with supporting briefs. The Respondent also filed a brief in answer to the exceptions and briefs filed by the General Counsel and the Charging Party.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudical error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, except as modified below.

1. The Trial Examiner found, and we agree, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by conditionally refusing to advance the date on which the Respondent and Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter called the Union, usually commenced their contract negotiations. Accordingly, we shall dismiss this allegation of the complaint.

2. The Trial Examiner also found, and we agree that the Respondent engaged in bad faith bargaining with the Union in the shop-maintenance and clerical-drafting units from July 20,1964, to November 10, 1964, by entering into and conducting negotiations with a fixed determination to

avoid, rather than reach, an agreement, in violation of Section 8(a)(5) and (1) of the Act.[3]

3. We similarly agree with the Trial Examiner's finding that the Respondent further violated Section 8(a)(5) and (1) by failing to disclose to the Union certain financial and other data upon which the Respondent relied in support of its claim that it was losing competitive contracts because of the high cost of its fringe benefits and/or other labor costs.

4. The Trial Examiner also found that the Respondent violated Section 8(a)(1) and not Section 8(a)(5) of the Act by refusing, for a period of 9 months, to furnish information requested by the Union pertaining to the seniority of nonunit employees. While we agree that the Respondent's refusal indeed violates the Act, we base our conclusion on grounds somewhat different from those of the Trial Examiner.[4]

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[3] In adopting the Trial Examiner's finding, that Respondent violated Section 8(a)(5) and (1) by engaging in unlawful "surface bargaining," we rely not only upon the factors considered by him in reaching that conclusion but also upon the Respondent's unlawful refusal to provide adequate documentation of its "cost reduction" position throughout the negotiations. The latter position was one of the principal bones of contention at all such times. Our colleagues' disagreement with our finding as to "surface bargaining" appears inconsistent with their holding, in agreement with us, that Respondent's refusal to provide adequate documentation of its "cost reduction" position was itself a violation of Section 8(a)(5) and (1).

[4] The Trial Examiner found that any union activity which serves or aids employees in their right to engage in concerted activities for their "mutual aid or protection" is protected by Section 8(a)(1). Based thereon, the Trial Examiner further found that the Respondent's 9-month refusal to supply the nonunit seniority data frustrated the Union's discharge of its duty to aid employees to enjoy their Section 7 "mutual aid or protection" guarantee, in violation of Section 8(a)(1).

In this regard, the record shows that the contract between the parties provided that nonunit employees would accumulate seniority for time spent in nonunit positions and, upon transfer into a unit, would be entitled to bump unit employees who had less total seniority. Transfer into a unit could occur if there was a layoff of nonunit personnel, if the Respondent offered such laid-off employee the opporunity to go into a unit, and if the employee accepted the offer. In 1963, the Respondent laid off 600 to 700 unit employees and thereafter transferred 2 nonunit employees into a unit, one of whom, because of his seniority, bumped a less senior unit employee. Some unit employees thereupon questioned the possible effect similar transfers might have on their seniority and job status. Consequently, the Union requested that the Respondent furnish it with a list of nonunit employees eligible for transfer into a unit and also requested information pertaining to the seniority and job classifications of management employees who might be transferred into a unit. The stated purpose of these requests was to enable the Union to administer its contract, i.e., to enable the Union to advise unit employees of these seniority facts and the possible adverse effects such transfers might have upon their unit seniority and also to assist unit employees in making and carrying out decisions regarding their jobs as a result of such transfers, or possible transfers, into a unit. The Respondent, however, refused to supply such data for a period of 9 months contending, in effect, that it was under no obligation to furnish the Union with information pertaining to nonunit employees.

The Union's right to such data, however, turns not on whether the employees to whom the data refers are in a unit, but rather on whether the data itself is necessary [5]

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[5] *Curtiss-Wright Corporation, Wright Aeronautical Division*, 145 NLRB 152, 156-157.

and relevant [6] to the Union's role as bargaining representative. Where, as here, the requested information relates to the possibility of unit job displacement by nonunit employees, we do not see how the Union could properly detect infractions of the contract or institute grievances in order to protect the rights of unit employees improperly or adversely affected by such transfers unless it were given the requested information. Nor do we see how the Union could intelligently discharge its further bargaining function of counselling and advising unit employees of their rights and status under the contract which the Union negotiated for them unless the Union had access to such data.

Accordingly, we find that the nonunit seniority information requested by the Union was both necessary and relevant to enable the Union to discharge its statutory bargaining function of administering its contract and that the parties litigated this matter within this context. We further find that the Respondent, by refusing to furnish the Union with the requested nonunit seniority data for a period of 9 months, violated Section 8(a)(5) and (1) of the Act.

5. The Trial Examiner found that the Board's 1951 certification in the engineer-technician unit was void *ab initio*, that the Respondent was at no time ever obligated to bargain with the Union in this unit, and that the Respondent, therefore, did not violate Section 8(a)(5) of the Act by withdrawing recognition from and refusing to bargain with the Union as bargaining representative of the professional employees in this unit. The General Counsel and the Union except to these findings. We find merit in such exceptions.

At the outset, we think it relevant to the resolution of this issue to set forth the history of bargaining in this unit. In 1945, the Board found appropriate, *inter alia*, an engi-

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[6] *Acme Industrial Co.*, 150 NLRB No. 144.

neering unit [7] composed of Respondent's engineers, assistant engineers, engineers' assistants, junior engineers, laboratory assistants, senior laboratory technicians, and senior engineers, and directed an election therein.[8] This direction of election, however, did not result in a certification in the engineering unit. In 1946, pursuant to a consent election agreement, an election was held in this engineering unit and a bargaining representative was certified by the Board. In 1947, as a result of negotiations by these parties relative to job descriptions and classifications in the unit, modifications in the original unit composition were made by eliminating the titles "laboratory technicians" and "engineers' assistants" and the parties created and substituted therefor the titles "Technicians A, B, and C." In 1948, the contracting parties redesignated the shop unit and the clerical unit as the shop-maintenance unit and the clerical drafting unit, respectively, and also redesignated the engineering unit as the engineer-technician unit.

In 1951, a representation hearing was held pursuant to a petition filed by the instant Union under Section 9(c) of the Act. In that proceeding, in which the 3 units, as redesignated, were involved, all parties agreed, with respect to the engineer-technician unit, that the engineers (and chemists) were professional employees but disagreed as to the status of the technicians theretofore included in this unit. The Union contended that the technicians were professional employees while the Respondent contended that they were not. The Board held that it was unnecessary to determine the status of the technicians since the record

[7] In this 1945 proceeding, the Board also found appropriate two other units of the Respondent's employees, namely, a shop unit and a clerical unit.

[8] *Federal Telecommunications Laboratories, Inc.*, 63 NLRB 947.

established that the unit was composed predominantly of employees whom the parties agreed were professional employees. Upon finding a community of interest and "in accordance with established precedent," the Board included the technicians in the professional unit without affording the professional employees a separate vote as provided for in Section 9(b)(1) of the Act.[9] Accordingly, the Board, in essence, continued in effect the units theretofor created by the parties by finding the aforementioned shop-maintenance, clerical-drafting, and engineer-technician units to be appropriate, and pursuant to an election, certified the instant Union as bargaining representative of the employees in these units.[10]

This matter then lay at rest for over 13 years during which the parties bargained continuously in this unit. It was revived at the instant hearing wherein adduced evidence established that the technicians who were included in the engineer-technician unit in 1951 were, indeed, nonprofessional employees.

The Respondent, however, despite the objection raised in the 1951 proceeding, has maintained a continuous relationship with the Union in these 3 units through collective bargaining agreements executed in 1951, 1952, 1954, 1956, 1959, and a Strike Settlement Agreement executed in 1961, which, by its terms, expired on September 9, 1964. In addition, the Respondent did not raise any further objection as to the composition of any unit until October 8, 1964, at which time employees in all 3 units, including the pro-

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[9] Section 9(b)(1) provides in pertinent part that ". . . the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . . ."

[10] *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395.

fessional employees, were engaged in a strike.[11] On this date, the Respondent withdrew recognition from, and refused to bargain with, the Union as representative of the professional employees in the engineer-technician unit.[12] On this same day, the Respondent also filed 2 petitions under Section 9(c) of the Act requesting that elections be held either in a unit limited to professional employees or, alternatively, in the existing certified unit of professional and nonprofessional employees. The Respondent grounded its withdrawal of recognition on the unsupported claim that it doubted that the Union still represented a majority of employees in this unit because a substantial number of professional employees had abandoned the strike by October 8, and because a group of professional employees in the engineer-technician unit had, on the previ-

[11] The Trial Examiner found that it was unnecessary to determine whether the strike, which began on September 9, 1964, was an economic strike or an unfair labor practice strike which had been caused or prolonged by the Respondent's unfair labor practices. The General Counsel excepts to the Trial Examiner's failure to find that the strike was an unfair labor practice strike either from its inception or from the time of the Respondent's withdrawal of recognition from the Union as bargaining agent for the professional employees in the engineer-technician unit. At the hearing, however, the General Counsel did not litigate the issue relative to the cause of the strike but instead took the position that the strike was an economic strike which became converted into an unfair labor practice strike by the Respondent's withdrawal of recognition. In any event, in view of the information received by the Trial Examiner subsequent to the hearing to the effect that all of the strikers who had sought reinstatement had been returned to their former jobs (Trial Examiner's Decision, p. 20, footnote 43), we find it unnecessary to resolve this matter as no useful purpose would be served by so doing.

[12] There is no controversy as to the Union's representative status with regard to the nonprofessional employees in this unit, or as to the other 2 units, or as to the present composition of the engineer-technician unit which the General Counsel and the Union admit contains both professional and nonprofessional employees.

ous day, filed a decertification petition seeking an election in a unit consisting of professional employees only.[13] The Trial Examiner correctly found that the Union represented a majority of the unit employees at the time of Respondent's withdrawal of recognition, and, further, that the Respondent at that time did not have a good-faith doubt of the Union's majority in the unit. At the hearing, the Respondent, relying mainly upon *Leedom* v. *Kyne,* 358 U.S. 184, contended that its withdrawal of recognition from and refusal to bargain with the Union with regard to the professional employees did not violate Section 8(a)(5) and (1) of the Act because the Board's 1951 finding that the engineer-technician unit was appropriate was made without affording the professional employees a separate election as provided in Section 9(b)(1) of the Act, and that, therefore, the Respondent was not obligated to bargain with the Union because the Union's certification as representative of this unit was not binding on the Respondent. The Trial Examiner upheld the Respondent's contention. We disagree.

For purposes of decision here, we assume that *Leedom* v. *Kyne,* although factually distinguishable in at least one respect,[14] is applicable to the Board's unit determination in Case No. 2-RC-2282 and that the certification which was issued in that case in 1951 was therefore invalid. But, as we point out below, it does not follow from the fact that

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[13] All 3 petitions were dismissed by the Board because of the pendency of the unfair labor practice charges filed in the instant cases.

[14] In *Leedom* v. *Kyne,* there had been no history of bargaining for a mixed unit of professional and nonprofessional employees prior to the Board's certification. Here, as mentioned earlier, there was already an established engineer-technician unit in existence at the time of the 1951 certification, and a 5-year history of bargaining in it, albeit with another labor organization.

the 1951 certification was a nullity, that the engineer-technician unit, as it was constituted in 1964 after a lengthy bargaining history, was either illegal or inappropriate. The issue in this case is not whether *Leedom* v. *Kyne* is applicable to the Board's action in Case No. 2-RC-2282. Rather, it is whether the rule of that case is applicable to the Respondent's withdrawal of recognition in 1964, in the middle of negotiations and after a 14-year history of bargaining. In the particular circumstances of this case we hold that it is not.

We believe this case to be governed by the same considerations that guided our decision in *Vincent Drugs*, 144 NLRB 1247. In that case it was argued that the Board under no circumstances could consider a combined unit of professionals and nonprofessionals to be appropriate unless the professionals at some time had been afforded an opportunity to vote for exclusion as provided in Section 9(b)(1). In rejecting that argument, we noted, *inter alia*, that nothing in the statute either condemns such a unit as illegal or declares it inherently inappropriate. On the basis of our analysis of the legislative history, we concluded that Section 9(b)(1), although precluding *the Board* itself from initially establishing such a mixed unit in a representation proceeding without a self-determination election, does not preclude an *employer and a union* from voluntarily establishing and maintaining such a unit as one appropriate for collective bargaining. We reiterate and reaffirm here what we stated in *Vincent Drugs* on this subject.

On the record here, we think there can be little doubt that the mixed unit which both parties recognized as appropriate when they entered upon their 1964 negotiations was bottomed upon a consensual arrangement rather than upon any mistaken belief by either party that the 1951 Board action possessed a continuing vitality. The parties' entire course of conduct since 1951, including the negotia-

tion of six collective-bargaining agreements during this period clearly evidences their mutual intent to maintain a bargaining relationship in an engineer-technician unit, without reference to the 1951 certification or reliance upon it. This is apparent in part from the record evidence disclosing the many revisions, amendments and clarifications in classifications that were made from time to time in the unit composition covered by the contracts negotiated since 1951. These modifications, although not so substantial as to change the basic unit, have, however, so altered the 1951 certification as to make clear that the parties, at least in recent years, have viewed this relationship as founded on consent rather than on the Board's 1951 certification.

The consensual foundation for the parties' continued dealings in the engineer-technician unit is even more apparent from other aspects of the bargaining history. Thus, even after the Supreme Court decided *Leedom* v. *Kyne* in 1958, the parties continued to bargain in the engineer-technician unit, just as they had done before, concluding a new agreement in 1959 and again in 1961. Had the Respondent been unwilling to accept the unit on a voluntary basis, opportunities were available to it to test the unit question at the time of the 1959 and 1961 reopenings. It took no steps to do so. Its entry into the 1964 negotiations was a further affirmation of its continued acceptance of the historically established unit. Significantly, it was not until after such negotiations had been underway for some time, and a strike had occurred, that the Respondent decided to withdraw recognition from the Union as the representative of the mixed unit, even though, as found above, it then had no reasonable basis to doubt the Union's continued majority status in that unit. The withdrawal occurred in a context of other and still unremedied unfair labor practices, as herein found, which would have precluded an opportunity for a free and fair election.

In view of the foregoing, we can give no credence to the Respondent's claim that its acceptance of the unit rested upon the 1951 certification rather than upon voluntary consent. On the contrary, we find that the unit which both parties recognized as appropriate when they entered into their 1964 negotiations was a product of the agreement of the parties. Bearing in mind that such a unit is not inherently inappropriate, and considering particularly the long bargaining history in that unit, as well as the timing and context of the Respondent's withdrawal, we hold that the Respondent is estopped at this time from disputing the appropriateness of the unit which it itself had accepted as a proper basis for bargaining during the very negotiations which it later disrupted by its withdrawal of recognition.[15] Accordingly, we find that the Respondent, by

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[15] Our holding here is not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time and in the appropriate proceeding; now is not an appropriate time because of the Respondent's unremedied unfair labor practices.

Our dissenting colleagues argue that because the unit was "illegitimate at birth," it could not thereafter under any circumstances achieve "respectability."

We think, however, that the honorable nature of the bargaining relationship's birth in 1946 and of its growth and development by consent in its later life should be given some consideration as against the stigma of the 1951 certification, on the sole basis of which our dissenting colleagues would illegitimatize the relationship at the option of one of its theretofore willing participants at a time when it was engaged in interposing other unlawful obstacles to good faith bargaining.

As noted above, we recognize that the policy laid down by Congress in 9(b)(1) would in a proper case require the granting of a separate election to professional employees at a proper time, notwithstanding that long bargaining history.

We hold here only that Congress could not have intended the 9(b)(1) requirement to be applied in such a manner as to provide a shield behind which one party, after having benefitted from the bargaining relationship for so many years, may with impunity in mid-negotiations, for whatever tactical advantage it hopes to secure, seek to shatter the bargaining structure it has itself joined to create.

withdrawing recognition from and refusing to bargain with the Union as bargaining representative of the professional employees in the engineer-technician unit has violated 8(a)(5) and (1) of the Act since October 8, 1964.[16]

6. Based upon his finding that the Respondent was not obligated to bargain with the Union as representative of the professional employees in the engineer-technician unit, the Trial Examiner also found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with certain merit review data pertaining to this mixed unit. We do not agree.

The record shows that the most recent contract between the Respondent and the Union provided for the bi-annual payment of merit increases to designated professional employees in the engineer-technician unit from a fund allocated by the Respondent. The fund itself was divided into 2 parts, one part consisting of two-thirds of the fund, and the other of one-third. With regard to the two-thirds portion, the recipients and amounts of merit increases were to be determined by the Respondent, and if, after discussing the Respondent's selections and amounts with the Union "there is no agreement," the Respondent had the right to grant increases to those employees selected by it. The designation of recipients and distribution of amounts of the remaining one-third portion was subject to the Union's acceptance of those selected by the Respondent

[16] We also find that the reasons set forth by the Trial Examiner with regard to the Respondents' bad-faith bargaining in the shop-maintenance and clerical-drafting units apply with equal force to the Respondent's bargaining in the engineer-technician unit. Accordingly, we find that the Respondent also engaged in bad-faith bargaining with the Union in the engineer-technician unit from July 20, 1964, to October 8, 1964, by entering into and conducting negotiations with the Union in this unit with a fixed determination to avoid, rather than reach, an agreement, in violation of Section 8(a)(5) and (1) of the Act.

with the right to arbitrate unresolved dispute. The Union did not agree with the Respondent's selection and distribution with regard to the two-thirds fund portion due for 1963, and on June 1 and 3 of 1964, requested the merit review evaluation factors used by the Respondent to "rate this money." The Union requested this data in order to submit equitable recommendations as to the proposed recipients of the one-third portion of the fund due for 1963, but which had not yet been distributed. The Respondent, however, refused to submit the requested information to the Union on the ground that the contract contained no provision requiring it to furnish such data.

The merit review data sought by the Union was, like the seniority data discussed *supra*, necessary and relevant to the Union's role as bargaining representative. Thus, the Union required this information to enable it to meet its contractual obligation of discussing both parts of the merit review fund, and, with this same information, to process any grievances which might arise as to the one-third portion of the fund. Further, the record shows that the merit evaluation data sought pertained to merit increases, which, themselves, constitute a mandatory subject of bargaining because they are a part of the wage structure.[17]

In view of the foregoing, we conclude that Respondent, by refusing to furnish the merit evaluation factors requested by the Union, has violated Section 8(a)(5) and (1) of the Act.[18]

7. The Trial Examiner found that the Respondent, by means of threats and promises, unlawfully solicited 2 of approximately 1100 striking employees to abandon the

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[17] *E. W. Scripps Company*, 94 NLRB 227, 228.

[18] *Curtiss-Wright Corporation, Wright Aeronautical Division, supra.*

strike, in violation of Section 8(a)(1). In view of the other violations committed by the Respondent, we agree with the Trial Examiner that these solicitations were not isolated but, instead, warrant the issuance of a remedial order.

Petition for Revocation of Certification
Case No. 2-RC-2282

On April 3, 1965, a group of professional employees in the engineer-technician unit filed the above-captioned petition which, in effect, seeks to have the 1951 certification in this unit declared void *ab initio*. As we have previously indicated in our discussion of this unit in the foregoing unfair labor practice cases, the subsequent bargaining history of the parties reflects that the parties have not relied on the certification and that the certification no longer has any efficacy. Accordingly, we find that the issue raised by this petition is moot.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, International Telegraph & Telephone Corporation (ITT Federal Laboratories), Nutley, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, as the exclusive representative of Respondent's employees in the engineer-technician bargaining unit and the bargaining units set forth in Appendices B and C attached hereto.

(b) Refusing to disclose to the aforesaid labor organization data in the Respondent's possession pertaining to the seniority of nonunit employees who have been, or might be, transferred into a unit.

(c) Refusing to disclose to the aforesaid labor organization the merit review evaluation data relied upon by the Respondent in allocating the two-thirds portion of the merit fund to profession employees in the engineer-technician bargaining unit.

(d) Refusing to disclose to the aforesaid labor organization such data as Respondent relied, or may have relied, upon in asserting during contract negotations that the relatively high cost of existing employee benefits is adversely affecting its competitive status or has caused it to lose competitive contracts.

(e) Offering strikers special inducements to return to work and threatening them with loss of benefits if they do not return.

(f) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist labor organizations, including the above Union, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, with respect to the terms and conditions of employment of the employees in the engineer-technician unit and in the units described in Appendices B and C, attached hereto, and if an understanding is reached, embody it in a signed agreement.

(b) Upon request, make available for inspection by the aforesaid labor organization data in its possession pertaining to the seniority of nonunit employees who have been, or might be, transferred into a unit.

(c) Upon request, make available for inspection by the aforesaid labor organization the merit review evaluation data relied upon by it in allocating the two-thirds portion of the merit fund to professional employees in the engineer-technician bargaining unit.

(d) Upon request, make available for inspection by the aforesaid labor organization such data as it relied, or may have relied, upon in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive status or has caused it to lose competitive contracts.

(e) Post at its plant in Nutley, New Jersey, copies of the attached notice marked Appendix "A."[19] Copies of said notice, to be furnished by the Regional Director for Region 22, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for

[19] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 22, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., June 29, 1966.

FRANK W. MCCULLOCH, Chairman

GERALD A. BROWN, Member

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Members Fanning and Jenkins, concurring in part and dissenting in part:

We agree with the majority that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to disclose to the Union certain financial and other data upon which the Respondent relied in support of its claim that it was losing competitive contracts because of the high cost of its fringe benefits and/or other labor costs, and by refusing, for a 9-month period, to furnish information requested by the Union pertaining to the seniority of nonunit employees. We would also find, like our colleagues, that the Respondent did not violate the Act by conditionally refusing to advance the date on which the parties usually began their contract negotiations. We do not agree, however, that the Respondent did not otherwise bargain in good faith or that the engineer-technician unit is an appropriate bargaining unit within the meaning of the Statute.[20]

1. We do not believe that the record warrants holding that the Respondent entered into and thereafter conducted negotiations with a fixed determination to avoid rather than reach an agreement with the Union in any unit whatsoever. In reaching a contrary conclusion, our colleagues have failed to consider the entire course of bargaining. Instead, they have adopted the Trial Examiner's limited findings that the Respondent's entry into negotiations was predicated on bad faith because of certain statements made

[20] Member Fanning would, in view of the other violations, also find Respondent's effort to induce 2 of 1100 striking employees to abandon the strike to violate Section 8(a)(1). Member Jenkins would, in view of the fact that there is no other independent violation of Section 8(a)(1), find this conduct of Respondent to be isolated and insufficient basis for a finding of a separate violation of 8(a)(1). Cf. *Middleton Manufacturing Company, Inc.*, 141 NLRB 234, 244; *Twin-Kee Manufacturing Co., Inc.*, 130 NLRB 614, 616.

by the Respondent's labor relations manager prior to the commencement of negotiations, and that the Respondent thereafter engaged in surface bargaining because the Union's proposals for improvements in existing fringe benefits were met by the Respondent's counter proposals for reductions in such benefits. More specifically, the Trial Examiner found illegality in the Respondent's proposal to reduce severely existing pension benefits and in an alleged "package" offer proposal. We do not subscribe to these conclusions.

With regard to the prenegotiation statements, the record shows that on two occasions prior to the commencement of negotiations, Carey, the Respondent's labor relations manager, and a Union steward became embroiled in heated disputes concerning certain grievances and that, on both occasions, Carey stated that the Respondent could no longer live with some of the current contract provisions and was preparing contract proposals of such a nature that it would take a long strike in order to condition the Union to accept them.

The contract negotiations began on July 20, 1964. The record establishes that the theme dominant throughout the ensuing 16 bargaining sessions was quickly established at the second meeting when, in answer to the Union's demands for increased fringe benefits, the Respondent informed the Union that it was seeking a reduction in overall labor costs, and, therefore, sought specifically to reduce fringe benefit outlays. Although the Respondent repeatedly iterated this position throughout the bargaining, the Union also remained firm in its position. Neither party conceded anything to the other until the eleventh meeting held on September 8, 1964. Union president Laird testified, in effect, that at that time, the Respondent agreed to modify many of its positions with regard to the Union's demands and made fringe and nonfringe concessions; the Respondent also presented a pension proposal which, while granting

some items sought therein by the Union,[21] also proposed to severely reduce existing pension benefits. The Trial Examiner found, on the basis of Laird's testimony, that all these proposals were rejected because they were presented as a package proposal which the Union was obligated to accept or reject *in toto*.[22]

On September 9, 1964, the current contract expired and the Union called a strike in which approximately 1100 employees represented by the Union participated. It was admitted at the hearing herein by the General Counsel, and was not otherwise litigated, that the strike was economic in nature and was not caused by any unfair labor practices. Despite the strike, however, the parties continued to bar-

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[21] Although the record is not clear as to which items the Respondent granted, it is clear that the Union sought certain vesting rights, the elimination of social security deductions, the elimination of age requirements, and a bonus for early retirement.

[22] Whether Respondent's proposals were presented as a package or not seems to have little relevance to "good faith" in the bargaining, since there is nothing inherently objectionable to package proposals. However, to the extent it is material, it would appear that the Trial Examiner's finding of a package offer is against the weight of credible evidence. Laird, because of his inability to recollect the events which there took place, was permitted to testify on this matter from notes which he took at the meeting. On cross-examination, Laird admitted that he had given an affidavit to the General Counsel which stated that "these proposals were somewhat softened in an effort to induce the IUE not to go out on strike at the expiration of the contract on the following day." Laird also admitted that after he had completed the affidavit for the General Counsel, he took it to the office of the Union's attorney. Although there is no evidence to show that this attorney had attended any of the bargaining sessions or that he was authorized to administer oaths, the record shows that he struck out the above statement from the affidavit and substituted therefor the following: "These proposals were presented in a package. We were told they had to be accepted or rejected *in toto* and we couldn't accept some and reject some." Laird further admitted that the notes from which he testified contained no reference whatsoever to a package deal.

gain, and, at meetings held on September 19, 28, and October 10, 1964, the Respondent attempted to move toward an agreement by making further modifications and concessions in fringe and nonfringe items. The Union, however, which had presented 71 original demands at the first meeting held on July 20, 1964 (and also joined the other two unions not here involved in presenting 20 joint proposals), also presented 46 additional demands at the twelfth meeting held on September 19, 1960 [sic]. Of these, 32 were apparently new, and it presented 25 more demands, some of which were new, at the sixteenth session held on October 10, 1964. Moreover, during this entire course of bargaining, the Union apparently did not modify any of its positions except to change its demand for a 35-hour (from the established 40-hour) workweek with no loss of pay to a 37½-hour workweek with no loss of pay.

It is clear, therefore, that throughout the entire course of negotiations, the Respondent consistently sought to decrease its overall and fringe costs, and submitted proposals to this effect for consideration by the Union and in answer to the Union's proposals for increased benefits. This is also precisely what happened with regard to the Respondent's pension proposal.

On the basis of the foregoing, it would appear that the reasons relied upon for finding a violation are without foundation, and that, consequently, Carey's prenegotiation statements cannot be construed as a forecast that "Respondent's bargaining strategy—was to take positions calculated to avoid agreement, and to provoke a prolonged strike that would so weaken the Union that it would be forced to capitulate." We do not believe that Carey's statements can be construed as anything more than mere intemperate remarks totally unrelated to the subsequent bargaining, or at worst, bluster designed to induce the Union negotiator to believe in the Employer's firmness in bargaining. Moreover, if the Respondent's negotiating

conduct in general, and its September 8 pension proposal and alleged package proposal in particular, constituted bad-faith bargaining, then the strike which began on the following day would, perforce, be an unfair labor practice strike. Yet, it was admitted by the General Counsel at the hearing, and was not otherwise litigated, that the strike was an economic strike. Finally, we find no record support for the Trial Examiner's conclusion that despite fringe and nonfringe concessions made by the Respondent at the meetings of September 19, 28, and October 10, 1964, the net result of all of the bargaining was that "the parties were further apart than ever." We would find, instead, that the Respondent's concessions, even if unacceptable to the Union, and particularly when considered in context with the Union's increasing demands, clearly show that the Respondent was bargaining in good faith and was, in fact, endeavoring to reach an agreement.

2. Unlike our colleagues, we would find, in agreement with the Trial Examiner, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the bargaining representative of the professional employees in the engineer-technician unit.

As related above, in 1951 the Board found that it was unnecessary to decide whether the technicians in this unit were professional employees, did not allow a self-determination election therein, and found that the unit was appropriate because it was composed predominantly of professional employees. Accordingly, the Board, following an election, certified the Union as representative of both the professional and nonprofessional employees in this unit.

Although the Respondent objected to this procedure, it nevertheless then entered into and, until October 8, 1964, maintained contractual relationships with the Union in this unit. On October 8, 1964, subsequent to the filing of peti-

tions under Section 9(c) of the Act by the Respondent and by a group of professional employees in this unit, the Respondent withdrew recognition from, and refused to bargain with, the Union as representative of the professional employees in this mixed unit.

Section 9(b)(1) of the Act specifically states with regard to the unit appropriate for the purposes of collective bargaining that ". . . the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . ." The legislative history of Section 9(b)(1), moreover, shows a considered Congressional purpose to restrict the power of the Board with regard to mixed unit determinations. The committee reports reflect that "When Congress passed the National Labor Relations Act, it recognized that the community of interests among members of a skilled craft might be quite different from those of unskilled employees . . ." The reports further reflect that corresponding recognition should be afforded to the "special problems" of professional persons who "have a great community of interest in maintaining certain professional standards."[23] The House conference report explains the adoption of Section 9(b)(1) as a restriction imposed on "the Board" and designed to provide "substantially larger protection of [the professional employees' self-determination] rights *when bargaining units are being established* than has heretofore been the practice."[24] The obligation which Congress imposed on the Board is defined by Congress as being that ". . . the Board is *required* to afford such [professional] groups an oppor-

[23] S. Report 105, 80th Cong., 1st sess., p. 11; 1 Leg. Hist. LMRA (1947) 417.

[24] H. Conf. Rept. 510, 80th Cong., 1st sess., p. 147; 1 Leg. Hist. LMRA (1947) 551.

tunity to vote in a separate election to ascertain whether or not they wish to have a bargaining representative of their own." [25] From the foregoing, it seems clear that the intent of Congress when it enacted this provision was to prohibit the Board from finding appropriate mixed units that heretofore had been or in the future would be established by the Board, unless compliance was first had with the provisions of Section 9(b)(1).

This conclusion is, of course, supported by the *Kyne* case in which the Supreme Court overturned the Board's finding that a mixed unit was appropriate in the absence of a self-determination election. There the Court held, in effect, that such an election should have been conducted because "Section 9(b)(1) is [a] clear and mandatory" provision which prohibits the Board from deciding that any mixed unit is appropriate unless a Section 9(b)(1) election is first had. The Court further held that professional employees could not be deprived of this election "right assured to them by Congress" by "an attempted exercise of power that had been specifically withheld" by Congress.

Our colleagues seek to distinguish *Kyne* on the ground that the issue presented in this case is not governed by the precepts contained in *Kyne,* but rather by the rationale contained in *Vincent Drugs.* We discern nothing in the statutory language or legislative history or even in the rationale set forth in *Vincent Drugs,* although the facts therein are inapposite, to support this distinction, and the Court's description of the Board's action in *Kyne* as "in excess of its delegated powers and contrary to a specific prohibition in the Act" (358 U. S. at 188) reinforces our conclusion.

Our colleagues, however, have determined that despite the invalidity of the 1951 certification, the provisions of

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[25] S. Report 105, 80th Cong., 1st sess., p. 11; 1 Leg. Hist. LMRA (1947) 417.

Section 9(b)(1) have no relevancy to the contested issue and that the limited considerations attendant in *Vincent Drugs* have application to the circumstances present in the instant case. In reaching this conclusion, the majority has impliedly found that at some undefined time during or prior to 1964, the parties disestablished the certified unit, ceased relying on the 1951 certification, and tacitly entered into a new, voluntary, consensual arrangement.[26] These results, however, not only relegate to private parties the public powers possessed only by the Board, but also ignore the specific provisions of the Statute and the Congressional intent manifest therein, and unduly extend the application of the *Vincent Drugs* doctrine to circumstances which even *Vincent Drugs* itself would exclude.

That doctrine was established in a case which arose because of the Union's attempt to enforce a union-security clause and thereby cause the discharge of a professional employee who was included in a mixed unit which, 6 years previously, the parties had initially voluntarily established without the benefit of a Section 9(b)(1) election. Predicated on the findings that Section 9(b)(1) of the Act does not preclude the voluntary establishment of mixed units which, in themselves, are not inherently inappropriate, and in consideration of the long bargaining history between the parties, the Board dismissed the complaint. Thus, in *Vincent Drugs*, the mixed unit was never certified by the Board nor was a representation election in the mixed unit sought. Both of these factors, however, are present in the instant proceeding and comport fully with the Board's interpretation of the limitations of

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[26] In this connection, it should be noted that as the result of a dispute concerning classification in the engineer-technician unit, the matter went to arbitration, and that in his opinion rendered on July 11, *1960*, the arbitrator stated that ". . . I would be less than judicious if I ignored the certification upon which the contract recognition clause rests."

the Board's powers as expressed in *Vincent Drugs*, namely, that Section 9(b)(1) "circumscribes the Board's discretion to determine the appropriate unit where an election is being sought in a unit including professional employees", and that Section 9(b)(1) is applicable when "a representation election is sought in a unit including professional employees and others."

We would find, therefore, that the 1951 certification is the basis of the entire relationship between the parties and that the limitations within which they governed their entire relationship was and is bottomed exclusively on that certification which only the Board and not the parties can modify. The theory of self-help advocated by our colleagues can result only in interminable confusion with regard to bargaining units in particular and collective bargaining in general.

Accordingly, we do not agree with the majority that the Respondent and the professional employees are now estopped from disputing the appropriateness of a unit which was admittedly illegitimate at birth and which could not, in our view, thereafter achieve the respectability now sought to be thrust upon it. Having reached this conclusion, we would further find that the Respondent and the professional employees have not abrogated their respective rights to contest the appropriateness of the unit because of their acquiescence and participation in a long-established bargaining relationship, even though they did not do so until several years after *Kyne* was decided. There is no statute of limtations either proscribed or authorized to be imposed by Section 9(b(1), nor can the public policy inherent in a self-determination election for professionals be the subject of waiver or estoppel of the parties.

We share our colleagues' apprehension that industrial stability achieved through long established bargaining units may be disturbed by voiding the certification here.

However, we must also adhere to the legislative requirements manifested in Section 9(b)(1) of the Act until such time as Congress directs otherwise. Accordingly, we would find that the 1951 certification in the engineer-technician unit is void *ab initio,* that the Respondent was at no time ever obligated to bargain with the Union in this unit, and that the Respondent did not violate the Act by withdrawing recognition from and refusing to bargain with the Union as representative of the professional employees in the unit. Correspondingly, it follows, of course, that the Petition for Revocation of Certification should be granted in Case No. 2-RC-2282.

3. Having found that the Respondent was never obligated to bargain with the Union in the engineer-technician unit, we would further find that the Respondent's refusal to furnish the Union with merit review data pertaining to this mixed unit is also not violative of the Act, and would, therefore, also dismiss this related allegation.

Dated, Washington, D.C., June 29, 1966.

.....

JOHN H. FANNING, Member

.....

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL bargain collectively, upon request, with Local 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, as the exclusive representative of our employees in the engineer-technician unit and in the shop-maintenance and clerical-drafting units with respect to rates of pay, wages, and hours of employment, and other conditions of work, and, if an understanding is reached, embody it in a signed agreement.

WE WILL FURNISH to said labor organization, upon request, information concerning any personnel action taken, or event occurring, since October 13 or 22, 1964, that is relevant to a determination of the seniority that would be acquired by nonunit personnel, if transferred into the foregoing bargaining units pursuant to applicable contract provisions.

WE WILL DISCLOSE to said labor organization, upon request, the merit review evaluation data on which we relied in allocating the two-thirds portion of the merit fund to professional employees in the engineer-technician bargaining unit.

WE WILL DISCLOSE to said labor organization, upon request, all data in our possession on which we relied or may have relied in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting our competitive position or causing us to lose competitive con-

WE WILL NOT offer to strikers special inducements to return to work or threaten them with loss of benefits if they do not return.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

INTERNATIONAL TELEPHONE & TELEGRAPH CORP.
(Employer)

Dated .....

By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102 (Tel. No. 645-3088).

APPENDIX "B"

(Clerical-Drafting Unit)

All employees at Respondent's Nutley, New Jersey, plant in the following classifications, excluding supervisors:

Buyer "A"
Buyer "B"
Buyer "C"

Planner "A"
Planner "B"
Planner "C"

Technical Clerk "A"
Technical Clerk "B"

Photographer "A"
Photographer "B"

Photographer Helper "A"
Photographer Helper "B"

Secretary
Stenographer "A"
Stenographer "B"

Typist "A"
Typist "B"

Vari-Typist "A"
Vari-Typist "B"

Statistical Typist

Clerk Reproduction "A"
Clerk Reproduction "B"
Clerk Reproduction "C"

Clerk "A"
Clerk "B"
Clerk "C"

Junior Clerk

Telephone Operator

Senior Designer

Designer

Layout Draftsman "A"
Layout Draftsman "B"

Detailer
Detailer-Trainee

Senior Designer—Telephone
Designer—Telephone

Technical Illustrator (Artist) Senior
Technical Illustrator Senior
Technical Illustrator (Artist)
Technical Illustrator

APPENDIX "C"

(Shop-Maintenance Unit)

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Sr. Laboratory Mechanic
Exp. Tool & Die Maker*
Exp. Machinist
Machinist "A"
Machinist "B"
Inspector "A"
Inspector "B"
Exp. Glassblower
Glassblower "A"
Glassblower "B"
Exp. Engraver
Exp. Sheetmetal Worker*
Sheetmetal Worker "A"
Sheetmetal Worker "B"
Sheetmetal Worker "C"
Exp. Painter
Exp. Welder
Welder "A"
Exp. Assembler—Mechanical
Assembler "A"—Mechanical
Exp. Assembler—Vacuum Tube
Mounter Assembler
Mounter Assembler "B"—Vacuum Tube
Exhaust Operator "A"
Exhaust Operator "B"
Wireman "A"
Wireman "B"
Wireman "C"

Inspector Equipment
Inspector Tester—Transformer
Wireman and Transformer Worker
Inspector—Process
Inspector—Receiving
Stock Clerk "A"
Stock Clerk "B"
Receiving and Shipping Clerk
Warehouseman
Carpenter "A"
Carpenter "B"
Electrician "A"
Electrician "B"
Plumber Mechanic "A"
Plumber Mechanic "B"
Maintenance Mechanic "A"
Maintenance Mechanic "B"
Machine Repairman
Painter "A"
Painter "B"
Maintenance Helper
Cleaner
Chauffeur
Chauffeur's Helper
Aircraft Mechanic
Potter
Helper, Laboratory

Trial Examiner's Decision

(Cases Nos. 22-CA-2015 and 22-CA-2131)

The initial charges herein were served upon Respondent on July 19 and October 12, 1964.[2] The amended complaint issued on November 10, and the hearing was held on various dates between December 16, 1964, and January 8, 1965. The issues litigated related to alleged violations of Respondent's duty to bargain with the Union and to furnish information to it, and to alleged unlawful solicitation to strikers to return to work. After the hearing all parties filed briefs.

Upon consideration of the entire record,[3] I adopt the following findings and conclusions:

I. Respondent's business

International Telephone & Telegraph Corporation, hereinafter called Respondent, is a corporation organized under the laws of Maryland, and it operates, through a division known as ITT Federal Laboratories, plants at Nutley and Clifton, New Jersey. At these plants, Respondent is engaged in the manufacture, sale and distribution of communications equipment electronic devices and related items, and it annually ships from its Nutley plant to out-of-State points goods valued in excess of $50,000. The Nutley plant is the only one involved herein.

Respondent is engaged in commerce under the Act.

II. The labor organization involved

Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

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[1] Footnote regarding an irrelevant amendment of Company name omitted.

[2] All events hereinafter related occurred in 1964, unless otherwise stated.

[3] For corrections of the transcript of testimony taken herein, see p. 452 of the transcript, and Appendix D, attached hereto.

III. The unfair labor practices

The complaint, as amended, alleges that Respondent violated Section 8(a)(5) and (1) of the Act by the following conduct:

A. By refusing to furnish to the Union data relating to (1) seniority of employees outside the bargaining units here involved, (2) the basis for Respondent's allocation of merit increases, (3) and certain financial data.

B. By bargaining in bad faith since July 20.

C. By withdrawing recognition from the Union as the representative of one of the three units involved herein—namely, the engineer-technicians' unit, hereinafter called the "mixed" unit.

The complaint also alleges that Respondent independently violated Section 8(a)(1) of the Act by offering inducements to strikers to return to work.

The answer denies the substance of the foregoing allegation, and, in addition, pleads certain affirmative defenses.

A. *Sequence of events*

On January 17, 1951, the Board found appropriate three separate units of the employees involved herein, and directed elections in those units.[4] Pursuant to such elections, the Union was certified as the bargaining representative for all three units.

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[4] Federal Telecommunications Laboratories, Inc., 92 NLRB 1395. The employer in that case was a wholly-owned subsidiary of the Respondent, which subsidiary has since been dissolved, its operations being continued as a division of Respondent at the Nutley plant, among others. There is no contention that this change in the legal identity of the employer has any bearing on Respondent's obligation to honor the Board's certifications of the Union in 1951.

Trial Examiner's Decision

From 1951 to September 9, 1964, the parties had virtually continuous contractual relations, and the events hereinafter related occurred during the term of a contract effective from November 19, 1961, to September 9, 1964. This contract contained a provision that under certain circumstances non-unit personnel, including supervisors, who were transferred to unit jobs, were entitled to seniority from their date of original hire by Respondent rather than from the date of their transfer into the unit. The Union became concerned about the implications of this provision early in January 1964, and requested Respondent to furnish it with certain data relating to the seniority of current nonunit employees, generally. It is undisputed that Respondent refused for 9 months to furnish the data to the extent, and in the form, requested by the Union, but finally did so in October, after the instant charge had been filed.

In the current agreement there is also a provision for merit increases for engineers and other categories of employees in the mixed unit, and the contract confers upon the Union certain responsibilities in connection with the administration of this provision. On June 3, the Union, by letter, asked Respondent for certain information which it considered necessary to aid it in discharging its foregoing responsibilities. On June 5, Respondent replied that no provision of the contract required disclosure of such information and none has been furnished.

Bargaining for a new contract began with a meeting on July 20, and negotiations were still in progress at the time of the instant hearing.[5] In the negotiations, Respondent

[5] Two sister locals of the Union (Local 447 and Local 1703), which represented two units of employees of Respondent's Federal Laboratories Division at a plant in Clifton, New Jersey, bargained jointly with the Union for provisions of common concern to all three locals.

proposed various reductions in fringe benefits, pleading, *inter alia*, that they were excessive in comparison with those granted by its competitors, and were adversely affecting its competitive position. The Union on several occasions requested that Respondent substantiate its foregoing position by furnishing detailed financial data and information on a number of other items, including contracts allegedly lost by Respondent and the cost of existing fringe benefits in relation to other costs. On August 21, Respondent suggested that the Union reduce such request to writing. This was done in a letter of October 13. On December 10 Respondent refused, in effect, to furnish the bulk of the data requested by the Union.

Meanwhile, on September 9, upon the expiration of the existing contract, the Union had called a strike at Respondent's plant, and most of the employees had ceased to work. However, contract negotiations with respect to all three units at the Nutley plant continued until October 8, when Respondent announced that it was withdrawing recognition of the Union for the professional employees in the "mixed" unit and was filing petitions with the Board for elections in such unit.[6] This announcement was made the day after a petition had been filed with the Board to decertify the Union as the representative of the engineers in such mixed unit,[7] and was allegedly prompted by such petition. On December 9, all three petitions were dismissed by the Regional Director, because of the pendency of the instant charges.

On January 8, 1965, when the instant hearing was concluded, the strike was still in effect and no contract had yet been negotiated.

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[6] Cases Nos. 22-RM-191, and 22-RM-192.

[7] Case No. 22-RD-175.

B. *Discussion*

1. The seniority data issue

This issue arose early in 1964, long before the commencement of contract negotiations, and was unrelated to such negotiations. The existing contract provided that, under certain circumstances, not here relevant, persons transferred to the bargaining units from positions outside such units would be credited with seniority for time spent in such positions and thus would be entitled to "bump" employees already in the units who had less total seniority. In 1963, the Respondent laid off 600 to 700 unit employees, and late in December 1963, a supervisor, Cammarata, accepted a nonsupervisory position in the production and maintenance unit, thereby "bumping" a unit employee. This appears to have been the first instance of such a transfer under the foregoing contract provision. A few weeks later, in response to an inquiry by Laird, the president of the Union, concerning the possibility of other similar transfers into the units, Atkinson, Respondent's labor relations supervisor, stated only that the matter was under consideration, whereupon Laird asked Atkinson for a list of all individuals eligible for transfer into the units and for information as to Cammarata's seniority. Atkinson declined to furnish any data (other than that relating to Cammarata), contending that the Union was not entitled thereto. A letter dated January 22, from Laird, requesting specific data as to "management employees" in order to enable the Union to "administer its contract" was not answered. Early in February, when Laird asked whether Respondent would reply to his letter, Atkinson rejoined that the only seniority information that the Union would receive with respect to any individuals involved in a transfer would be that contained in a semi-

monthly bulletin issued by Respondent announcing personnel actions already taken.[8]

Laird testified further that when, shortly thereafter,[9] he solicited a reply to his letter from Carey, Respondent's manager of industrial relations, he asserted that no information would be forthcoming other than that contained in the semimonthly bulletin. However, according to Minogue, Respondent's director of industrial relations, Carey, on this occasion proposed that, in the future, whenever it decided to transfer anyone into the bargaining units, Respondent would, before effecting such transfer, furnish the Union with the pertinent seniority data as to such individuals. Laird denied that Carey made any such proposal. Carey, himself, was not called as a witness. On the basis of demeanor, and, in view of Respondent's failure to call Carey to corroborate Minogue, I credit Laird and find that Carey did not make even the limited offer of advance disclosure ascribed to him by Minogue.

It is undisputed, however, that the Union's blanket request of January 22, 1964, was finally honored on October 13 and 22 when the information sought was supplied.[10]

The General Counsel contends that the Respondent's refusal for about 9 months to furnish the seniority data requested by the Union violated Section 8(a)(5) and (1) of the Act. While conceding in its brief that the Union "was entitled to certain seniority information prior to an in-

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[8] The Union received the information it sought as to Cammarata in such a bulletin issued late in February, about 2 months *after* his transfer had been effected.

[9] Laird variously placed this incident in late February or mid-March.

[10] This disclosure was made after the initial charge here was filed and pursuant to a tentative settlement agreement, which was not, however, consummated. Such eventual compliance with the Union's request does not make the issue moot. *The Electric Furnace Co.*, 137 NLRB 1077.

dividual's return," Respondent denies that it was required to make the blanket disclosure sought.[11] The brief elaborates on this point as follows:

> It is Respondent's position . . . that the information as requested was unnecessary and of no value to Local 400, that it only took on some importance when an individual was about to return, and that this was the only time seniority information could be effectively used to advise bargaining unit employees.

Respondent contends further, relying on Minogue's aforecited testimony, that Carey offered to furnish the Union with the requested data as to any individual whose transfer to the unit was contemplated, and before such transfer was effected. However, for reasons stated above, I have refused to credit Minogue, and have instead credited Laird's testimony that the only data offered by Carey or Atkinson was that continued in the semimonthly, personnel bulletin, which reported transfers only after they had been effected.

Thus, it appears, that Respondent concedes that the Union was entitled to a limited advance disclosure of the seniority data in issue, and I find that for a period of 9 months Respondent, contrary to its contention, did not make, or offer to make, even such limited disclosure.

The question remains whether as the General Counsel contends, the Union was entitled to the more comprehensive advance disclosure sought by it. The Union's position was that it needed the seniority data as to nonunit employees so that it could compile a more realistic seniority list, and advise individual members of the bargaining unit to what extent their seniority rights would be adversely affected if all persons outside the unit who were eligible for transfer into the unit were so transferred. According to Laird's un-

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[11] Respondent's brief, p. 21.

contradicted testimony, the extensive layoffs effected in 1963, coupled with the transfer of Cammarata into the unit, late in December 1963, with the resultant bumping of a member of the unit, created concern among the employees, who were besieging the Union with questions about the possible effect of any like transfers in the future on their job status.

The foregoing contention raises a question which does not appear to have been heretofore considered by the Board. It is now well settled that a Union is entitled to information that is necessary and relevant, to the discharge, not only of its bargaining function, but also of its function of administering a contract. While the complaint alleges, and Laird's January 22 letter explains, that the Union needed the data to "administer" the contract, it is clear from the context of the complaint and the letter, and from Laird's testimony that "administer" was there used, not in the usual sense of detecting, and protesting, infractions of the contract, but rather in the narrower sense of maintaining more realistic, seniority rosters for the benefit of the unit employees. Moreover, had the Union desired the data for grievance purposes, there appears to be no reason why the Union could not wait until, as a result of a transfer, a unit employee suffered some adverse effect which could be the subject of a grievance. And, at that time the Union would have been entitled only to the data relevant to such grievance and not to the blanket disclosure here sought.

As for the relevance of the data sought to contract negotiations, there is a suggestion in Laird's testimony that the data would have enabled him to determine whether to seek in contract negotiations a modification of the existing contract provisions permitting transfers into the unit with accrued seniority.[12] However, Laird did not

[12] In fact, a clause limiting such transfers was proposed by the Union on July 28, in negotiations for a new contract.

assert that he had this purpose in mind when he made his various oral and written demands for the seniority data;[13] and the instant case was, moreover, litigated solely on the theory that the Respondent's refusal to furnish the data violated Section 8(a)(5) and (1) of the Act because the data was needed by the Union to enable it to "administer" the contract by maintaining proper seniority rosters.[14] Under all the circumstances, I find that the issue of the effect of Respondent's nondisclosure of the seniority data on the Union's contract-negotiation function was not adequately litigated.

There is, thus, insufficient basis for finding that the data was sought or needed to aid the Union's discharge of its grievance-prosecution or contract-negotiation function, and it has been established only that the Union's request was prompted by a desire to advise the unit employees of the potential impact of the Respondent's new transfer policy on their seniority and job tenure. So far as I am aware, the Board has not yet had occasion to pass on the duty of disclosure under such circumstances. However, the foregoing "advisory" purpose of the Union would seem to be as much an integral part of its statutory

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[13] Laird's reference to the possible usefulness of the data in connection with contract negotiations was made in response to a question as to what function such data might serve (apart from that of updating the seniority rosters), and not as a statement of Laird's reason for seeking the data. (As to the circumstances under which this question was asked, see next footnote.)

[14] Neither the complaint nor the briefs of the General Counsel and the Union allude to any other reason for requesting the data. Laird's reference to the possible usefulness of the data in connection with contract negotiations (see preceding footnote) was made only when, both parties having rested, he was recalled as a witness for the Trial Examiner over Respondent's objection.

role as the prosecution of grievances or negotiation of contracts. Section 8(a)(1) of the Act protects the right of employees to engage in concerted activities, not only for the purpose of collective bargaining, but also for "other mutual aid or protection." It follows that, subject to exceptions not here relevant, any activities of a union which serve this purpose of "other mutual aid or protection" are protected by Section 8(a)(1), and the furnishing by a union to employees of advice as to matters which bore some reasonable relation to their job security would seem to be such an activity.[15] The question remains what was the legal effect of Respondent's refusal to furnish such information. When an employer refuses to furnish data necessary to enable a union to discharge its bargaining function, and thereby impedes the union in the prosecution of the collective-bargaining activities protected by both Section 8(a)(5) and Section 8(a)(1) of the Act, he is held to violate those provisions. By analogy, it seems proper to hold that where an employer refuses to furnish data desired by a union in order to enable it to discharge some other function which falls within the ambit of Section 8(a)(1) of the Act, and thereby frustrates the Union's discharge of that function, he violates that provision of the Act. Respondent, itself, does not seriously dispute this, since, as already noted, it concedes that it owed the Union some duty of advance disclosure. The only difference between it and the General Counsel here is as to the exact timing and scope of the disclosure; the Respondent contending that the Union was entitled to advance disclosure only when a particular transfer into the units was imminent and only with respect to the individual about to be so transferred, and the Union contending that it

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[15] Cf. *Boeing Airplane Co.*, 110 NLRB 147, set aside 238 F. 2d 188 (C.A. 9).

was entitled to disclosure, upon request, of seniority data as to all individuals eligible for transfer into the units. When asked what use such disclosure would be to a unit employee unless a transfer affecting his seniority was imminent, Laird answered that such an employee would be in a better position to decide whether to accept an offer of other employment, if he knew just how firm his seniority ranking with Respondent was. Thus, a unit employee who would not otherwise consider such an offer might welcome it if he knew that there were enough nonunit employees with higher seniority eligible for transfer to jeopardize his tenure. It cannot be said that the "early warning" system which the Union thus sought to establish was not reasonably related to the "mutual aid or protection" of the employees.

Moreover, even if one accepts Respondent's position that there was no duty of disclosure until a transfer was impending, and then only with respect to the individual about to be transferred, it would still be necessary to find a violation, as it has been found that Respondent did not make even such limited disclosure.

For all these reasons, I find that Respondent's refusal for a period of 9 months to disclose the seniority data requested by the Union violated Section 8(a)(1) (although not Section 8(a)(5)) of the Act.

2. The nondisclosure of merit review data.

The current agreement contained a provision for periodic merit review for engineers, chemists and spectroscopists, and contemplates recommendations by the Union with regard to the distribution of one-third of any moneys allocated by Respondent for merit increases to employees in the foregoing classifications. The complaint alleges that Respondent violated its bargaining obligation by

refusing to furnish the Union with certain data requested by it to enable it to formulate appropriate recommendations for merit raises. However, the job classifications here involved fall within the mixed unit, and the question whether the refusal to furnish the data sought constituted a breach of the duty owed by Respondent to the Union as the statutory representative of the employees in the mixed unit cannot be resolved without first disposing of the Respondent's contention that such unit was inappropriate. Accordingly, the nondisclosure issue with respect to merit reviews for the mixed unit will be deferred, and treated below as part of the larger issue of the Union's legal status as the representative of the mixed unit.

3. The solicitation of strikers

Two of Respondent's engineers, who joined the strike called by the Union on September 9, testified without contradiction, and I find, that late in September Respondent's Laboratory Director, Dr. Panter, solicited them to abandon the strike and return to work. According to one witness (Goldshine), after pointing out that a number of engineers had already abandoned the strike, Panter told him that Respondent "would remember its loyal employees at merit review time." According to the other engineer (Patterson), Panter on September 18, in urging him to return to work, appealed to his loyalty to Respondent, and on September 23, promised the witness that if he was among the first employees to return to work he could "expect a raise and a promotion," but that if he returned "after the fifty per cent point, it won't count anymore," adding, "we will remember those who were loyal to us during the strike and those who were not."

Respondent does not dispute the veracity of the foregoing testimony, which I credit. At the hearing Respondent contended only that Panter was not a supervisor, and that Respondent was therefore not responsible for his conduct. In its brief, Respondent appears to have abandoned even this contention, referring to Panter as a "supervisor," and arguing only that the incident was "an isolated case and not part of any pattern of conduct."

In any event, it is clear from the record, and I find, that Panter was a supervisor. He directed the work of 30 or 40 employees, including about 25 engineers, and was assisted in that task by a "deputy" and 6 "group leaders." It is undisputed, moreoever, that Panter participated in meetings with the Union concerning grievances over the failure of engineers to receive merit increases, and acted for Respondent in resolving such grievances.

While the Board has held that mere appeals to strikers to return to work are not *per se* unlawful,[16] we are not dealing here with such appeals as were involved in those cases, but with solicitation which was reinforced by threats of reprisal and promises of benefits.

As to the "isolated" nature of the Panter incidents, it is true that his solicitation of the two engineers was the only such action shown to have occurred in a strike which involved 1,100 employees at the plant here involved, as well as 1,700, more at another plant [17] (who also struck on September 9), and that the strike up to the time of the instant hearing had been in effect for more than 3 months. It is also true, that the Board has held that even coercive utterances, such as are here involved, while unlawful, do not

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[16] *The Texas Company*, 93 NLRB 1358, 1361; *Celanese Corporation of America*, 95 NLRB 664.

[17] The one at Clifton. See Fn. 5, above.

warrant a remedial order, where they were addressed to relatively few employees and the respondent engaged in no other unfair labor practices.[18] However, in view of the other violations found herein, such cases are clearly not apposite.[19]

Accordingly, I find that, by Panter's threats and promises, to induce employees to abandon the strike, Respondent violated Section 8(a)(1) of the Act.

4. The withdrawal of recognition with respect to the "mixed" unit

As already related, in January 1951, the Board in a representation proceeding determined, *inter alia,* that the mixed unit was appropriate and, on the basis of the ensuing election certified the Union as the representative of such unit. In that proceeding the Respondent had contended that the mixed unit was not appropriate because it would include certain classification designed "technicians A, B and C," in a unit which otherwise consisted of professional employees—engineers and chemists. In so contending, Respondent relied on Section 9(b)(1) of the 1948 amendments to the Act, which provision precludes the Board from finding appropriate for the purposes of collective bargaining a unit which "includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." At that time, however, it was the Board's

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[18] *Middletown Mfg. Co.,* 141 NLRB 234; *Twin-Kee Mfg. Co.,* 130 NLRB 614.

[19] As the strike activity of the engineers was protected, concerted action, regardless of the legal status of the Union as their representative, any determination of such status adverse to the Union cannot affect the result here reached as to the unlawfulness of Panter's solicitation.

policy, notwithstanding the foregoing provision, to find appropriate a unit consisting of both professional and nonprofessional employees, without affording the professional employees an opportunity to vote on the issue of separate representation, provided that such unit was composed predominantly of professional employees.[20] In view of this policy, the Board held in the foregoing representation case as follows:

> "Under the circumstances, we need not decide whether technicians are professional employees within the meaning of the statutory definition. As all the parties are agreed that the engineers and chemists are professional employees, and the record clearly shows that . . . the bargaining unit as proposed by the petitioners . . . is composed predominantly of professional employees within the meaning of Section 2(12), we find in accordance with established precedent that the technicians may appropriately be included" in the unit sought.

After the certification of the Union for the mixed unit, as well as the other two units here involved, the Respondent, as already related, recognized the Union as the representative of such units and entered into a series of contracts covering all three units, which contracts extended from 1951 to September 9, 1964. Even after the expiration of the last such contract on September 9, 1964, Respondent continued to recognize the Union for all three units, until October 8, when, citing the fact that a petition had been filed the day before to decertify the Union as the representative of the professional employees in the mixed unit, and asserting

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[20] *Boeing Airplane Co.*, 86 NLRB 368; *Westinghouse Electric Corporation*, 89 NLRB 8.

that it entertained doubt as to the continuing majority status of the Union in such unit, Respondent withdrew recognition of the Union as the representative of the professional employees, offering, however, to continue to recognize the Union as the representative of the balance of the unit.[21]

The General Counsel contends that by such withdrawal of recognition Respondent violated Section 8(a)(5) and (1) of the Act. Respondent rejoins that the 1951 finding of the Board with respect to the appropriateness of the mixed unit was invalid because of the Board's failure to afford the professional employees a separate election as required by Section 9(b)(1) of the Act, and that the ensuing certification of the Union for such unit was not legally binding for that reason alone.

Respondent's main reliance here is on *Leedom* v. *Kyne*,[22] where the Supreme Court affirmed a district court finding that the Board had exceeded its statutory powers in finding appropriate a unit of professional and nonprofessional employees, without consulting the wishes of the professional employees as required by Section 9(b)(1) and, even though,

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[21] Respondent also pleaded in its answer, as an affirmative defense, that because of the decertification election, and the abandonment of the strike prior to October 8 by a substantial number of engineers, it entertained a good-faith doubt on that date that the Union still represented a majority of the employees in the mixed unit. However, as Respondent offered no testimony that it in fact entertained any such doubt, this defense was stricken at the hearing on motion of the General Counsel, which was not opposed by Respondent. In any case, since Respondent conceded at the hearing that on October 8 a clear majority of the employees in the mixed unit were still on strike on October 8, I would find no merit in this defense. It is not credible that Respondent could in good faith assume that any persons abandoning the strike were defectors from the Union, without at the same time assuming that those remaining on strike were union adherents.

[22] 358 U.S. 184 (1958).

as in the instant case, the professional employees predominated numerically.[23]

While it is well-settled that only under exceptional circumstances may a respondent relitigate in an unfair labor practice case a Board unit finding made in a representation case, such exceptional circumstances appear to be present here. Clearly, the Board's 1951 unit finding, insofar as it joined professionals with nonprofessionals, was invalid when made, as tested by the rule later announced in the *Kyne* case. What effect should be given to that ruling here necessarily raises questions which were not considered by the Board in the 1951 representation case and which Respondent would seem to be entitled to raise at this time,[24] unless, as contended by the General Counsel, this right has been waived or otherwise forfeited by Respondent.

We turn now to the foregoing "waiver" contention of the General Counsel. He points to the fact that Respondent had for 13 years acquiesced in the Board's mixed unit finding, and that such acquiescence continued even for 6 years after the 1958 ruling of the Supreme Court in *Leedom* v. *Kyne,* and the General Counsel asks, ". . . after how many years of bargaining in such a unit could Respondent validly raise the argument of *Kyne* v. *Leedom* . . .?"

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[23] In the Supreme Court, the Board, contrary to its position in the district court, did not dispute that it had exceeded its statutory power, and defended only on the ground that the matter was not properly before the courts. The Court rejected this defense.

[24] See *American Broadcasting Co.,* 134 NLRB 1458, where the Board, in a refusal to bargain case determined that the Union's certification was invalid because of a supervening Supreme Court ruling in a different case, and dismissed the complaint for that reason. The Board majority there stated: ". . . we believe that public confidence in the administrative process requires a tribunal to admit its errors and not push a matter to an erroneous conclusion under the guise of procedural regularity."

No authority on this point has been cited by the parties, and the issue seems to be one of first impression. If one looks at the statute alone, it appears that, while Section 9(d) contemplates the relitigation in unfair labor practices cases of the validity of Board action in representation proceedings, the Act nowhere prescribes any period of limitations within which such Board action may be challenged by a respondent. However, the General Counsel's argument seems to imply that the Board should for policy reasons impose some period of limitations upon the relitigation of representation case issues in unfair labor practice cases, no matter how meritorious the grounds for such relitigation.

It may seriously be doubted that the Board may lawfully take such action on policy grounds absent any specific authority therefor in the Act.[25] Moreover, it is an exceedingly rare case where an employer will, as here, first bargain with a union and later question the validity of its certification. Indeed, if the apparent absence of any decision dealing with such a situation is any criterion, the instant case may well be the first of its kind in the 30 years of the Board's history. I am not convinced therefore, that there are compelling policy reasons for adopting any rule of limitations in the area under consideration. As for the General Counsel's reliance on some legal rule of waiver or estoppel, those doctrines may ordinarily be invoked only on behalf of a party who has changed his position to his detriment in reliance upon some conduct of the adverse party. Here, it has not been shown that the Unions lost anything by Respondent's

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[25] See *Leedom* v. *Kyne, supra;; Colgate-Palmolive Peet Co.* v. *N.L.R.B.*, 338 U.S. 355. In the latter case, the court said:

> To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.

acquiescence in the Board's unit finding or by the negotiation of contracts on the basis of such finding.

In sum, I find no merit in the contention that Respondent's attack on the mixed unit comes too late.

In a somewhat different, but related vein, the General Counsel contends that, even if Respondent is not estopped to attack the Board's unit finding by its prolonged acceptance thereof, the incorporation by Respondent in the variout contracts negotiated with the Union of the unit found appropriate by the Board, together with substantial modifications thereof effected by the parties, renders inapplicable the provisions of Section 9(b) (1), as construed in the *Kyne* case. Here, the General Counsel relies on the case of *Vincent Drugs*,[26] where the issue was whether a union had violated Section 8(b)(2) of the Act by seeking to enforce a union-shop contract covering a mixed unit. The General Counsel there contended that the union-shop clause was invalid under Section 9(b)(1) of the Act because the unit was rendered inappropriate by the intermingling of professional with nonprofessionals, without affording the professionals an opportunity to vote for a separate unit. In fact, there had been no election at all in that case, as the unit was one voluntarily established by the parties. After a review of the legislative history of Section 9(b)(1), and Board and court decisions (which antedated Leedom v. Kyne), the Board concluded that 9(b)(1) was not applicable because there had been no prior resort in that case to a Board representation proceeding and the unit was purely consensual. The *Kyne* case was distinguished as follows:

> . . .the *Kyne* case was not concerned with the validity of an existing contract covering a unit of both pro-

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[26] 144 NLRB 1247.

fessional and nonprofessionals that had been established by the parties, based on an established collective bargaining history that preceded the making of the contract. The precise issue in the *Kyne* case was whether such a combined unit could be established initially by Board action in a representation proceeding without first affording the professional employees a self-determination election to authorize their inclusion in such a unit. We therefore find the cited case distinguishable and inapposite.

Thus, *Vincent Drugs* would seem to hold that Section 9(b)(1) applies only where the mixed unit is the creature of the Board, and not where it is the creature of the parties. Recognizing this, the General Counsel contends that the instant, mixed unit, although initially created by the Board, was transformed into a creature of the parties by the long history of bargaining with respect to such unit and the extensive alterations of the unit by the parties, and that Section 9(b)(1) is therefore inapplicable under *Vincent Drugs*. However, it is not clear how such negotiations and changes in the unit can cure the basic legal defect in the Board's unit finding—namely, the joinder of professionals and nonprofessionals without a self-determinative election for the professionals. It is not contended that the changes in the unit resulted in the elimination of all professionals or all nonprofessionals. Counsel concedes in his brief that the unit is presently mixed. An attempt to analogize the instant case to *Vincent Drugs* might be more appropriate if the Respondent were relying solely on the voluntary accretions to the unit as the basis for its attack thereon. The fact is, however, that the Respondent's attack on the unit is directed, not at the addition thereto by the parties of any

particular category, but rather at the *principle* of joinder of professionals with nonprofessionals, which was sanctioned by the Board in the representation case, over Respondent's objection. As it is thus clear that Respondent is challenging only the foregoing nonconsensual aspect of the unit, and not the consensual ingredients thereof, I deem *Vincent Drugs* inapposite.

Finally, the General Counsel contends that the Board did not expressly find in the 1951 representation case that the "technicians" there involved were not professional employees, deeming it unnecessary to decide that question, since under the Board's then policy it would not have affected the result.

While it is true that the Board made no affirmative finding in the 1951 representation case as to the professional status of the "technicians" included by the Board in the mixed unit, it would seem to be implicit in the language of Section 9(b)(1), as construed in the *Kyne* case, that such a finding is mandatory where the issue is appropriately raised, as it was here, else there would be no basis for determining whether the limitations of Section 9(b)(1) were applicable.[27] It follows that the Board's omission to make such a finding was, in itself, error and that the 1951 unit determination is invalid for that reason alone, if for no other reason.

In conclusion on this point, I find that the Board's 1951 determination as to the appropriateness of the mixed unit was invalid under the *Kyne* case, that such defect was not

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[27] Moreover, I am satisfied from evidence adduced before me that the "technicians" in the mixed unit did not satisfy, at any time here material, the statutory definition of professional employees. (The General Counsel appears to contend that such evidence shows only that the unit is now mixed, but not that it was mixed from its inception. However, the evidence adduced before me related to technicians A, B, and C, who were included in the unit as initially established by the Board.)

cured by Respondent's subsequent conduct, and that Respondent was therefore not obligated, at any time here material, to bargain with the Union with respect to such unit.[28] I will therefore recommend dismissal of the allegation of the complaint that Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to recognize the Union on October 8 as the representative of the mixed unit, as well as the related allegation that Respondent violated its bargaining duty by refusing to furnish the Union certain merit review data pertaining to the mixed unit.

5. The issue of bad-faith bargaining

a. *Appropriate unit*

The complaint, as amended, alleges that since July 20, Respondent negotiated with the Union in bad faith concerning the terms and conditions of employment of the employees in the three units here involved. As it has been found that one of these units—the mixed unit—was inappropriate, and Respondent was therefore under no statutory duty to deal with the Union as the representative of such unit, it will be recommended that the complaint be dismissed insofar as it alleges a failure to bargain in good faith with the union as the representative of such unit.

As to the other two units—referred to in the record as the "shop-maintenance" and "clerical-drafting" units—it was agreed at the hearing, and I find, that they are appropriate for the purposes of collective bargaining.[29]

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[28] As already noted, on October 8, Respondent offered to continue to recognize the Union as the representative of the nonprofessionals in the mixed unit. However, the Union did not accept the offer nor did it propose bargaining on any basis other than the certified units.

[29] As to the composition of such units, see Appendices B and C, attached hereto.

b. *Majority status*

It was agreed at the hearing, and I find, that, at all times here material, the Union represented a majority of the employees in each of the foregoing two units.

c. *The negotiations*

The negotiations under consideration were for contracts to replace those which were due to expire on September 9. The history of these negotiations begins with a meeting in the fall of 1963 between representatives of Respondent and the Union to discuss problems relating to the implementation of certain clauses in the 1961 contract—the so-called "transfer" clause [30] and the "two-cent" fund provision.[31] At this meeting, Respondent's director of industrial relations, Minogue, stated that, if those problems could be satisfactorily resolved, Respondent would be amenable to "early negotiations" for a new contract. On December 31, 1963, Laird, the Union's president, informed Minogue that agreement had been reached between the Union and Local 1703 regarding the transfer clause,[32] and inquired whether, in view of this, the Respondent would engage in "early" negotiations. Minogue promised to give the matter consideration. At a meeting in April, Respondent's representatives volunteered that there would be no early negoti-

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[30] This clause related to procedures to be followed by Respondent in transferring employees from the instant plant to the bargaining units in the Clifton plant of Respondent, represented by IUE Local 447 and 1703.

[31] This clause provided for the establishment of a fund in an amount to be computed by multiplying by two cents the number of man-hours worked in a designated week in the Nutley and Clifton plants, which fund was to be used to correct wage inequities in both plants.

[32] The transfer clause and the two-cents clause apparently contemplated agreement by Local 1703 and Local 447, as well as the Union, on the manner of their implementation.

ations unless the Union's parent withdrew a law suit recently filed by it to compel Respondent to establish the "two-cent" fund. When the Union responded that it had no control over the law suit, and urged that the parties "sit down" and negotiate, Respondent adhered to its position that there could be no negotiations until the suit was withdrawn. Late in May 1964, the Union's renewed plea for early negotiations was again rejected because of the pendency of the fund litigation. On June 11, Laird gave formal written notice to Minogue of the Union's desire to terminate the existing agreements and asked Minogue to communicate with Laird to arrange a meeting date. When, on June 23, Laird broached the matter of early negotiations, to McNeil, Respondent's vice president for industrial relations, he replied, in effect, that he did not believe in beginning negotiations earlier than was required by the contracts —namely, 30 days before the September 9, contract expiration date.[33] The next day, when Laird pointed out to Minogue that, if, pursuant to McNeil's edict, negotiations did not begin until August 10, and 2 weeks were lost thereafter because of vacations,[34] only 17 days would remain for actual negotiations before the contracts expired. In response, Minogue merely indicated that he would not overrule his

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[33] See Article XXIV of the 1959 contracts, as amended by the 1961 "Strike Settlement Agreement."

[34] In 1964, Respondent initiated a policy of suspending negotiations for 2 weeks in August to permit all the members of the negotiating committee to take their vacations at the same time. The former practice had been one of staggered vacations throughout the negotiations, which deprived the committee of the services of particular individuals at a time when their advice was needed. Laird did not dispute the wisdow of the new policy, but in a letter of June 3, proposed that Respondent compensate for the resulting loss of 2 weeks' negotiating time in August by starting to bargain 2 weeks earlier. For further discussion of this point, see footnote 38, below.

superior, McNeil, and when, on June 25, Minogue finally acknowledged Laird's aforementioned letter of June 11, he stated, with regard to a meeting date, only that meetings would be held in accordance with "Article XXIV of the current . . . agreements," which contained the 30-day provision alluded to by McNeil. On July 13, Laird again wrote Minogue, proposing deferral of vacations in order to enlarge the time available for negotiations.[35]

A few days later, Respondent announced that negotiations would begin on July 20, and the first bargaining session was held on that date.

Before discussing the actual negotiations, it may not be amiss to refer to two incidents, which the General Counsel contends afford an insight into the Respondent's approach to the 1964 negotiations. Both of the incidents involved an exchange between Carey, Respondent's labor relations manager, and LaGana, one of the Union's chief stewards. The first such incident occurred in March 1964, when, in the course of a rather heated dispute over certain grievances Carey taxed LaGana with being unreasonable, and declared that management could no longer "live with" some of the clauses in the current contract and was "preparing a set of proposals of such a nature that it would take a 14-week strike to condition" the Union to accept them, adding that, if LaGana served on the negotiating committee, "it would take a 28-week strike." On June 9, when, in the course of another dispute over the same matter, Carey indicated that Respondent would seek a change in the relevant contract provision, LaGana asked, "you mean you are sending out proposals like you told us . . . and you are going to put us out in the street for 14 weeks?" When Carey answered in

[35] This proposal was rejected by Respondent on July 27.

the affirmative, LaGana announced he had been elected to the Union's negotiating committee, which he took to portend a 28-week strike, in view of Carey's prior prognistication. To this, Carey retorted that, when the strike was over, LaGana might not even have a job.

Returning to the bargaining, at most of the sessions the Union bargained jointly with its two sister locals for provisions common to all 5 units represented by the three locals. In the other sessions, the Union bargained separately for provisions peculiar to the Nutley plant. At the first meeting, on July 20, the three unions submitted their joint contract proposals, which included demands for improvements in fringe benefits. In discussing these demands, Respondent referred to the adverse effect on its competitive position of the cost of existing fringe benefits, and announced its determination to reduce such costs. In this connection, Respondent asserted that it was "in a fight for survival," and that Respondent was losing many contracts because of the "cost factors". And in the counterproposals submitted by Respondent on July 31, it not only ruled out any improvement in existing fringe benefits but even proposed downward revision of such benefits. At the next meeting, on August 21, in rejecting a demand for an increase in group insurance coverage, Respondent reiterated its position that the negotiations would have to result in reduction of Respondent's costs to enable it to become competitive. Between August 21 and October 13, Laird made various requests for data bearing on Respondent's contention that the excessive cost of existing fringe benefits was impairing its competitive positions. These requests, and Respondent's reply thereto, will be considered in more detail below.

Although there were several meetings later in August and early in September, there were no significant develop-

ments until the meeting of September 8. On that date, Respondent submitted revised proposals, which represented some softening of its original written demands for reduction in fringe benefits, together with a new pension proposal. Laird testified and, I find, that these proposals were submitted as a package, which the Union was required to accept, or reject, *in toto*.[36] The pension proposal, moreover, called for a drastic reduction in existing benefits. By way of illustration, Laird stated that in his case his monthly pension in case of retirement after 20 years of service, would be reduced from $140 to about $55. The unions rejected all the foregoing proposals. At another meeting on September 9, Respondent withdrew or further modified some of the demands it had scaled down on September 8, On September 9, at midnight, both plants involved in the negotiations were struck. Bargaining continued thereafter with respect to all three units at the Nutley plant, until October 8, when Respondent announced its decision not to bargain further with the Union for the mixed unit. On October 10, the Union submitted revised proposals, and Respondent rejected all except some which related merely to retention of past practices and clarification of existing contract language.

At the time of the instant hearing, the strike was still in effect, and no agreement on a contract had as yet been reached.

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[36] Respondent points to certain matters in the record, which it contends reflect on the credibility of Laird's testimony that the September 8 proposals were presented as an indivisible package. However, I deem more significant than the matters cited by Respondent, the fact that Carey, Respondent's labor relations manager, to whom Laird attributed the statement that the offier [sic] was a "package," did not take the stand to dispute Laird's testimony.

Trial Examiner's Decision

Evaluation of the Negotiations

(1) The time factor

It is clear from the foregoing that Respondent resisted pressure by the Union that negotiations begin unconditionally at a date earlier than that normally adopted by the parties in their past bargaining,[37] and that Respondent conditioned any such acceleration of negotiations on settlement of the dispute over the transfer clause and on the withdrawal of the IUE's suit over the two-cent fund.

It is well settled that a respondent may not condition compliance with a proper request for bargaining upon the happening of some extraneous event. However, it may be noted that here, unlike the usual case of a conditional refusal to bargain, Respondent did not say that it would not bargain at all until the stipulated condition was met, but merely refused conditionally to advance the normal date for bargaining. Moreover, although in their contract the parties had stipulated that bargaining would begin "as soon as practicable" after receipt of new contract proposals (but not less than 30 days before the contract expiration date), the Union did not in fact submit any contract proposals until the first bargaining meeting, on July 20. Had the Union wished to force the issue of early negotiations, it needed only to submit its proposals and invoke the foregoing contract provision.

Finally, and perhaps most significant of all, we are not dealing here with a situation where the parties are bargain-

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[37] Respondent made an offer of proof that in the past negotiations for renewal of contracts expiring in the month of September had begun in July or August. While I ruled such evidence as to the exact dates involved to be irrelevant, it is inferrable from the record that the Union's purpose in proposing "early" negotiations was to begin them on a date earlier than that established by past practice.

ing for a first contract. On the contrary, the record shows that the parties had on six occasions in the past successfully negotiated contracts, and had done so without resorting to "early" negotiations. Under these circumstances, Respondent's refusal to start negotiations on a date in the spring of 1964, as proposed by the Union, would not, in itself, seem to reflect on its good faith.[38]

(2) *Carey's Strike Threat*

I find merit, however, in General Counsel's contention that Respondent's basic approach to the 1964 negotiations and its bad faith are demonstrated by Carey's warnings to LaGana early in 1964, cited above, that Respondent was preparing contract proposals which were so stringent that the Union would not accept them without a prolonged strike. The fact that Carey was provoked to utter these warnings by LaGana's obduracy in grievance sessions does not necessarily prove that they did not accurately reflect management's intentions. Moreover, I am compelled to infer from Carey's failure to take the stand that, had he been called as a witness, his testimony would not have been favorable to Respondent on this issue. Finally, I am struck by the fact that Carey's prognostications as to the course that the negotiations would take proved singularly accurate. Thus, Union proposals for improvements in existing fringe benefits were met by Respondent with insistence that there be substantial *reductions* in such benefits. While

[38] The General Counsel contends that Respondent impeded the 1964 negotiations unduly, when as noted above, it instituted a practice of suspending negotiations entirely for 2 weeks in August, and refused to compensate therefor, as suggested by the Union, by commencing them 2 weeks earlier than usual. However, it may be that Respondent's decision to start negotiations on July 20 rather than on August 10, as had been originally contemplated by McNeil, was in deference to the foregoing request.

Respondent softened its position somewhat on September 8 and 9, the effect of this was more than offset by two circumstances: (1) Respondent's insistence that the Union could not accept some of its proposals and reject others, but must treat all of them as a package, and (2) the Respondent's injection into the negotiations on September 8 of its proposal for a reduction in existing pension benefits *by more than 50 percent.* The net result was that, despite Respondent's apparent conciliatory movement in certain areas on September 8 and 9, the parties were further apart than ever; and the ensuing strike had at the time of the close of the instant hearing continued for 4 months. The conclusion is inescapable, therefore, that Carey, in his exchanges with La Gana, inadvertently let the "cat out of the bag," and gave La Gana an accurate blueprint of Respondent's bargaining strategy, which was to take positions calculated to avoid agreement, and to provoke a prolonged strike that would so weaken the Union that it would be forced to capitulate. And, so far as appears from the present record, Respondent adhered to that blueprint throughout the negotiations.

It is well settled that it is incompatible with the statutory requirement of good faith bargaining to negotiate, as here, with a fixed determination to avoid, rather than reach, agreement. Accordingly, I find that Respondent from July 20 to November 10,[39] bargained with the Union in bad faith with respect to contracts for the shop-maintenance and clerical-drafting units, thereby violating Section 8(a) (5) and (1) of the Act.

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[39] This is the cut-off date alleged in the complaint, as amended at the hearing.

6. The financial and contract data issue

The complaint alleges that on various occasions during the 1964 negotiations, the Union requested certain data relating to Respondent's financial position, income, and costs; that Respondent has refused to furnish such data; that such data was necessary to enable the Union to bargain intelligently with regard to certain proposals by Respondent for reduction in employee benefits; and that by such refusal Respondent violated Section 8(a)(5) and (1) of the Act.

As already related, early in the negotiations (on July 24), Respondent struck a note which pervaded the later bargaining—namely, that its objective in the negotiations was to secure reduction of its labor costs, particularly employee fringe benefits, which it contended were higher than those of most of its competitors, and thereby were adversely affecting its competitive position, and resulting in the loss of contracts awarded on the basis of competitive bidding. When, on August 21, Laird asked Respondent for more details as to the relative cost of employee fringe benefits and the contracts allegedly lost because of the cost of such benefits, Respondent suggested that he put his request in writing, for consideration by Respondent's legal counsel. When Laird orally renewed his request on August 25, Respondent proposed that he take the matter up with its comptroller, Kaploe, at the meeting scheduled for August 27. However, Kaploe did not appear at that meeting nor, so far as the record shows, at any subsequent meeting; and, according to Laird, Respondent vouchsafed no reply, when on October 10, he orally asked for information on various items, including a profit and loss statement, and the names of Respondent's competitors. Finally, on October 13, Laird addressed a letter

to Respondent requesting the following information as to the operations of its Federal Laboratories Division:

1. The names of major competitors.
2. Auditor's reports for the past 2 or 3 years with regard to income, profit and loss, net sales, cost of sales, selling and administrative costs, payroll and fringe benefit costs, ratio of such costs to net sales, ratio of other costs to net sales, overhead costs not properly chargeable to the Nutley plant, profits before and after taxes, current and total assets and liabilities, depreciation, surplus, and net worth.
3. Total compensation of management personnel.
4. Comparison of costs and prices of each of its major competitors.
5. Contracts lost during the last 2 or 3 years because it was not competitive.
6. The record of the Division as a separate entity and its relation to that of Respondent's other divisions.
7. The accuracy of a newspaper report that it had on hand military contracts valued at $150 million dollars, and whether such contracts had been awarded to it because it underbid its major competitors.
8. The ratio of fringe benefits to total costs.
9. All factors considered by Respondent in determining competitive position.
10. Cost of certain management fringe benefits.

11. All other information in Respondent's possession on which it based its contention regarding its competitive position.

The letter concludes with an offer that, to facilitate compliance with the Union's request, the pertinent books and records of Respondent be examined by a mutually acceptable certified accountant.

By letter of December 10, Respondent replied that it had been advised by counsel that it was not obliged to furnish the data requested, and it is implicit from the balance of the letter that this position was based on the view that Respondent had already divulged certain of the requested data in the course of the negotiations and that the Union was not entitled to any further disclosure, as Respondent was not pleading inability to pay. In this connection, the letter recites the following information, requested by the Union, and already supplied to it:

1. The names of nine competitors.
2. Two contracts lost by Respondent because it was not "competitive."
3. The fact that Respondent's net income after taxes was less than one percent of sales.
4. The total cost of each of 10 fringe benefit items.

Laird admitted at the hearing that Respondent in the negotiations disavowed any plea of inability to pay, professing only a desire to improve its competitive position; that Respondent informed him that its competitors were "every big electronic company in the United States," and gave him the names of at least some of its competitors who were thought to have less liberal fringe benefits than Re-

spondent; and that he knew of one contract lost by Respondent to a competitor.

Respondent defends mainly on the ground that it had no obligation to furnish any of the requested data because, in justifying its proposals for reductions in fringe benefits, Respondent did not claim inability to pay the existing benefits but only that lowering of its labor costs would improve its competitive position in bidding for contracts, and that its relatively generous, fringe benefits had been responsible for loss of contracts in competitive bidding. While it appears that Respondent, early in the negotiations, linked its demand for lower fringe benefits with the issue of job security and with a reference to a "fight for survival," I am satisfied from Laird's own testimony that Respondent made it sufficiently clear during the negotiations that it was not claiming that it lacked the wherewithal to continue to pay the cost of the existing fringe benefits, but only that it deemed its fringe benefits to be so far out of line with those of its competitors as to be responsible for its loss of contracts to them. In any case, it is clear from Respondent's December 10 letter that that is its present position. Even so, it is well settled that an employer may be required to document, not only a plea of inability to pay, but also a plea that his competitive position is adversely affected by his high labor costs.[40]

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[40] *The Celotex Corporation,* 146 NLRB No. 8 (while this aspect of the *Celotex* case is not discussed in the Board's Decision, it was litigated before the Board on exceptions to the Trial Examiner's Report, and the issue is now before the United States Court of Appeals for the Fifth Circuit (Case No. 21994)); *Peerless Distributing Co.,* 144 NLRB 1510; *Cincinnati Cordage & Paper Co.,* 141 NLRB 72, 77; *Wheeling Pacific Company,* 151 NLRB No. 121.

Respondent cites *Charles E. Honaker,* 147 NLRB No. 145. However, in that case the Board held only that there was no duty to

In any case, it is clear that the Supreme Court's rationale in the *Truitt* case—[41] that good faith bargaining requires that a bargainer's claim "be honest claims," and that he be willing to support them by proof of their accuracy—is not in terms limited to a plea of inability to pay but would seem to apply with equal force to any assertion by a party in support of a bargaining demand, which is susceptible of documentation by data available to it and not available to the other party. Respondent's claim here of the worsening of its competitive position by its past liberality in the matter of fringe benefits was such an assertion and was susceptible of such documentation. It may be pointed out, however, that the nature of the data that a respondent may be required to produce may well be different when he pleads that he does not have the present means to pay certain benefits and when, as here, he complains only that the payment of existing benefits has caused him to lose contracts to competitors. While, in the former case, the Union would be entitled to an order requiring disclosure of all books and records relating to the respondent's financial

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furnish financial data where the Respondent did not plead inability to pay, and, where, although professing a desire to "remain competitive" with similar operations in the area, Respondent meant thereby only that it did not wish to pay more than the prevailing rate (there being no real competition between it and the other like operations in the area). While there is some support for Respondent's position in *Taylor Foundry Co.*, 141 NLRB 765, enfd. 338 F. 2d 1003 (C.A. 5), the Board's statement therein cited by Respondent is mere dictum, and must be deemed in any case to be superseded by the square holdings to the contrary in the later cases cited above.

Finally, I find no merit in Respondent's contention that the Union forfeited any right it may have had to the data in question by not pressing its demand therefor with sufficient diligence. See the *Celotex Corporation, supra,* at p. 6 of Intermediate Report.

[41] *N.L.R.B.* v. *Truitt,* 351 U.S. 149.

status, in the latter case it would seem that the appropriate remedy would be to compel disclosure of only such data as the employer relied on in asserting that his competitive position had been so impaired by his generosity to his employees that he had lost out in bidding for contracts. Applying those principles here, I find that the Union was entitled to disclosure of the names of those competitors of Respondent whose fringe benefits were alleged to be lower than Respondent's and of the identity of all contracts allegedly lost during the term of the expiring collective-bargaining agreements because of underbidding by such competitors, together with any other data in Respondent's possession on which it relied in reaching the conclusion that such contracts were lost because of its relatively high fringe benefits or other labor costs.[42]

I find further that in its letter of October 13, if not before, the Union made an adequate, albeit inartistic, request for disclosure of such data as it was entitled to receive. (See particularly items 1, 5, and 11, of that letter, as set forth above.)

I find, finally, that, even if it be assumed that Respondent, as it claims, had already furnished to the Union all the data set forth in its letter of December 10, such disclosure would not satisfy the requirements of the Act, and that, by failing to make adequate disclosure, Respondent violated Section 8(a)(5) and (1) of the Act.[43]

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[42] The foregoing should not be construed as relieving Respondent entirely of the obligation to furnish any data as to its financial position, but as requiring that it furnish only such financial data as entered into its determination that its fringe benefit expense was responsible for its inability to underbid its competitors.

[43] The complaint, as amended at the hearing, alleged that the strike called on September 9 was caused or prolonged by Respondent's unfair labor practices. However, after the hearing counsel for the Union and for the Respondent advised me by letter that the strike had ended, and that they were informed by their respective clients

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in section III, above, occuring in connection with the operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It having been found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

It will be recommended, *inter alia*, that Respondent be required to make available to the Union such data as Respondent may rely on in asserting in contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive position or causing it to lose contracts.[44]

It has been found that Respondent violated Section 8(a)(1) of the Act by its delay in furnishing the seniority

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that all strikers who sought reinstatement had been restored to their former jobs. The General Counsel does not dispute this (see Trial Examiner's Exhibits Nos. 5, 6, and 7). As there, accordingly, no longer appears to be any issue concerning reinstatement of the strikers, I do not deem it necessary to determine whether the strike was caused or prolonged by Respondent's unfair labor practices or was merely an economic strike.

[44] However, in complying with this requirement, Respondent need not supply the Union with the names of all its major competitors, as it already did so in its letter of December 10, if not before.

data relative to nonunit employees, requested by the Union. As such data has already been furnished, no useful purpose would be served by requiring that the same data be furnished again. However, it will be recommended that Respondent be required, upon request, to advise the Union of any personnel action taken, or any events occurring, since such data was supplied that are relevant to a determination of the seniority rating that would be acquired by nonunit personnel, if transferred into the appropriate bargaining unit pursuant to applicable contract provisions.

VI. Conclusions of law

1. The bargaining units set forth in Appendices B and C, attached hereto, are appropriate for purposes of collective bargaining under the Act.

2. At all times here relevant the Union has been the statutory representative of Respondent's employees in the said bargaining units.

3. From July 20, to November 10, 1964, Respondent failed and refused to bargain in good faith with the Union as the representative of Respondent's employees in the foregoing units thereby violating Section 8(a)(5) and (1) of the Act.

4. Since, at least, December 10, 1964, Respondent has refused to disclose to the Union data necessary to enable it to verify Respondent's claim that the level of existing fringe benefits was adversely affecting Respondent's competitive position, and to enable the Union to bargain intelligently with regard to proposals for reduction of such

benefits. By such refusal Respondent has violated Section 8(a)(5) and (1) of the Act.

5. Between January 15, and October 22, 1964, Respondent violated Section 8(a) (1) of the Act, by refusing to furnish the Union with certain data requested by it relating to the seniority that would be acquired by nonunit personnel, if they were transferred into the foregoing bargaining units.

6. By coercively soliciting strikers to return to work, Respondent violated Section 8(a)(1) of the Act.

7. The "mixed" unit for which the Union was certified by the Board in 1951, was not, and is not now, appropriate for collective bargaining, because of the joinder therein of professional and nonprofessional employees, without affording the former an opportunity to vote for separate representation. By refusing on and after October 8, 1964, to recognize the Union as the representative of such unit, and by refusing to furnish the Union with merit review data relative to the employees in such unit, Respondent has not violated Section 8(a)(5) and (1) of the Act.

Recommended Order

Upon the entire record in this proceeding and the foregoing findings of fact and conclusions of law, Respondent, International Telephone & Telegraph Corporation, Nutley, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 400, International Union of Electrical, Radio & Machine

Workers of America, AFL-CIO, as the exclusive representative of Respondent's employees in the bargaining units set forth in Appendices B and C, attached hereto.

(b) Refusing to disclose to the aforesaid labor organization all data in Respondent's possession, on which it may rely in asserting the [sic] contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive position or has caused it to lose contracts.

(c) Offering strikers special inducements to return to work and threatening them with loss of benefits if they do not return.

(d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist a labor organization including the above Union, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Work-

ers of America, AFL-CIO, with respect to the terms and conditions of employment of the employees in the units described in Appendices B and C, attached hereto, and if an understanding is reached, embody it in a signed agreement.

(b) Upon request, make available for inspection by said union, information concerning any personnel actions or any other events occurring since October 13, or 22, 1964, that are relevant to a determination of the seniority that would be acquired within the foregoing units by nonunit personnel, if transferred into such units pursuant to applicable contract provisions.

(c) Post at its plant in Nutley, New Jersey, copies of the notice attached hereto and marked Appendix "A."[45] Copies of said notice, to be furnished by the Regional Director for the Twenty-Second Region, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-Second Region, in writing, within 20 days from the date of receipt

---

[45] If this Recommended Order is adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in such notice. If this Order is enforced by a decree of the United States Court of Appeals, the notice shall be further amended by substituting for the words "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

of this Decision, what steps Respondent has taken to comply herewith. [46]

Dated at Washington, D. C. Apr. 15, 1965.

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

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[46] If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

(Appendices to Trial Examiner's Decision Omitted)

Errata

The Trial Examiner's Decision issued in the above case on April 15, 1965, is hereby ordered corrected as follows:

1. Page 8, ll. 29-30, change "classification designed" to "classifications designated."

2. Page 21, l. 56, change "the" to "in" before "contract."

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

Dated: April 16, 1965.

Appendix B

Statutory Provisions Involved

Section 8(a)(5) of the National Labor Relations Act, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5), provides:

> "SEC. 8. (a) It shall be an unfair labor practice for an employer
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Sections 9(a) and (b) of the National Labor Relations Act, as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(a) and (b), provide:

> REPRESENTATIVES AND ELECTIONS
>
> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appro-

priate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO, and PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO, and PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent, Local 400 International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, hereinafter referred to as "Local 400" or "Union", prays that

the application of Petitioner, International Telephone and Telegraph Corporation, hereinafter referred to as the "Company," for the issuance of a Writ of Certiorari to reverse the Decree of the United States Court of Appeals for the Third Circuit entered on August 31, 1967, affirming and enforcing the Order issued by the National Labor Relations Board on June 29, 1966, be denied.

Counter-Statement of Question Presented

Was the petitioner's withdrawal of recognition from and refusal to bargain with the respondent Local 400 as bargaining representative of the professional employees in the Engineer-Technician unit, after the commission of earlier unfair labor practices, and during the course of a lawful strike, a violation of section 8(a)(5) of the National Labor Relations Act?

Counter-Statement of the Case

Local 400 is and has been since 1951 the representative of employees of the Company's Nutley, New Jersey research facilities in three separate bargaining units, commonly known as the "Engineer-Technician" unit, "Clerical-Drafting" unit, and "Shop-Maintenance" unit (P108a; R6b).* These units were originally established in 1945 by the predecessors of both Local 400 and the Company (P421a; 63NRLB947). Following the NLRB proceedings the units were modified by consent of the parties to conform to the aforementioned designations and the modifications so reflected in collective agreements which were effective until Local 400 became the designated bargaining agent. Said basic units were continued thereafter by Local 400 (P108a; P109a).

---

* Reference to the Company's appendix filed below will be designated "P—a". Reference to the Board's appendix filed below will be designated "R—b".

In 1951 the unit structure created by the parties was continued by the Board in a representation proceeding which resulted in recognition of Local 400. The Company had sought a separate vote for professionals and proposed exclusion of technicians. The Union contended technicians were professionals. The Board made no determination on this issue, and pursuant to Board principles then applicable directed an election in which the technicians voted with those clearly conceded to be professionals (P108a; 92NLRB1395).

Since 1951 ITT and Local 400 have been parties to collective agreements for the years 1951-1952, 1952-1954, 1954-1956, 1956-1959, 1959-1961, and 1961-1964 (P109a; R4b to R8b, G. C. Exhs. 2c, 2d, 3c, 4, 5 and 6). In virtually each of these years additional alterations were effected in the composition of the bargaining units. The original 1945 units were altered, extended and modified by the various collective agreements, NLRB proceedings, arbitration awards and interim agreements between the parties. The Engineer-Technician unit in the last contract was more extensive and different than the units as originally constituted (P112a; R61b, G. C. Exhs. 7 and 8; P324a to P332a, G. C. Exh. 9b; R81b to R84b, G. C. Exh. 13; R91b, G. C. Exh. 22; R94b, G. C. Exh. 23).

The 1961-1964 contract was to expire by its terms on September 9 (R18b; P109a). On July 20, 1964, new contract negotiations commenced between the company and Local 400 (P43a; P65a). The parties were unable to reach agreement by the expiration date and on September 9, 1964, a strike commenced (R71b; P44a). Negotiations with respect to each of the units continued after commencement of the strike and until October 8, 1964, when the company withdrew recognition from Local 400 as the bargaining agent for the professional employees in the Engineer-

Technician unit (P366a, G. C. Exh. 32). Bargaining continued in the other units, though under the cloud of bad faith as more specifically set forth in the Board's order (P44a; P109a).

Prior and subsequent to the aforementioned strike several unfair labor practice charges were filed alleging various actions of the company constituted unlawful interference and a refusal to bargain in violation of Section 8(a)(1) and (5) of the Act (P3a to P6a, G. C. Exhs. 1A, E, H). A complaint was issued, a hearing held before a Trial Examiner, and a Board decision rendered which found, *inter alia,* that the Company had violated Section 8(a)(5) of the Act in withdrawing recognition of the union and refusing to bargain in the Engineer-Technician unit, rejecting the company's contention that said unit was inappropriate under *Leedom* v. *Kyne,* 358 U. S. 184 (1958). Said decision was affirmed by the Court of Appeals.

Reasons for Denying the Writ

1. The withdrawal of recognition and refusal to bargain in the Engineer-Technician unit was unlawful and in violation of Section 8(a)(5) of the National Labor Relations Act. Said conclusion of the Board and the Court of Appeals is not in conflict with *Leedom* v. *Kyne, supra.* Petitioner's contention that *Leedom* v. *Kyne,* as it interprets Section 9(b)(1) of the Act, precludes the Board from declaring under any circumstances, and in any proceeding, that a "mixed unit" is appropriate for collective bargaining, misconstrues the statute, ignores the basic principle in *Leedom* v. *Kyne,* and would extend a broader application to the decision than contemplated by the Court.

The company's contentions to the contrary notwithstanding, the collective bargaining unit in issue was not created in the 1951 Board decision, but rather had its genesis

in the Board's opinion in the 1945 decision, *Federal Telecommunications Laboratories, Inc.*, 63 NLRB 947 (1945), and was modified, altered and extended by the consent of the parties thereafter. This is demonstrated by a review of the bargaining history.

In 1945 the Board directed an election in three separate units, to wit, an *engineering unit*, thereafter referred to by the parties as the "Engineer-Technician" unit, a *clerical unit*, thereafter referred to by the parties as the "Clerical-Drafting" unit, and a *shop unit* which thereafter became known as the "Shop-Maintenance" unit. Said election resulted in a certification only for the shop employees. The "Engineering" unit included engineers' assistants, junior engineers, laboratory assistants, senior laboratory technicians, and senior engineers.

In 1946 a consent election was conducted in the *engineering unit* which resulted in a certification. In the spring of 1947 the company and the union effected modifications in the *engineering unit* when they created the classifications "Technician A, B & C" and eliminated the titles "Laboratory Technicians" and "Engineers' Assistants" (P107a; P425a; P427a; P428a).

In 1948 the parties executed separate 2-year contracts covering each of the groups hereinbefore referred to which were then known and designated as the "Engineer-Technician" unit, "Clerical-Drafting" unit, and the "Shop-Maintenance" unit.

Upon expiration of the 1948-1950 contracts representation petitions were filed by Local 400. These units created by the parties were affirmed, in essence, in the Board's decision in *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395, 1397 (1951).

Local 400 was certified in the election conducted under the 1951 decision. The "Engineer-Technician" unit con-

tinued, with modifications, alterations, and extensions as thereafter reflected in the six collective agreements negotiated in the years 1951 through 1964 (G. C. Exhs. 2c, 3c, 4, 5, 6, 2d). Changes were made in this unit by the consent of the parties through negotiated agreements, arbitration awards, and grievance settlements (G. C. Exhs. 7, 9(a) and (b), 22, 23, 24(a)(b)(c), 25, and 40; R24b to R31b).

Petitioner conceded that it recognized and bargained with the union in the Engineer-Technician unit and that no issue had been raised with respect thereto prior to October 8, 1964, when a decertification petition was filed on behalf of the professions (R6b; R62b).

The National Labor Relations Act merely precludes the Board from establishing a unit of professionals and non-professionals in a 9(a) proceeding unless the professionals have been afforded the right of self-determination provided in 9(b)(1). Neither the statute or *Kyne* PROHIBIT a mixed unit as inappropriate *per se*. *Kyne* must be read and applied in the context of its factual presentation.

In *Kyne* the Board conceded it had combined professionals with non-professionals in an original petition. Immediately thereafter, and before any bargaining commenced, the Board's determination was attacked as *contra* to 9(b)(1).

In the instant case the bargaining history reflects that the unit was in fact *created* by the parties as they modified the 1945 and 1951 Board decisions. Numerous collective agreements were negotiated between the parties. Substantial modifications were effected in the unit. Although many opportunities were available to test this unit question including the time of the 1959 and 1961 contract reopening periods—both following *Leedom* v. *Kyne*—no

steps were taken to do so. After 14 years of bargaining in this unit the question is now raised for the first time in the face of other unfair labor practices by respondent which would preclude an opportunity for a free and uncoerced election.

The company failed to offer any evidence as to the composition of the unit, nor did it offer any evidence to contradict the proof that the unit had been created by the parties and substantially altered by them since the 1945 and 1951 Board decisions. The company's sole claim is that when the professionals were denied an opportunity for self-determination in 1951 such conduct was unlawful, the unit is therefore void *ab initio,* that *Leedom* v. *Kyne, supra,* compels a finding that the "mixed" unit is inappropriate, and therefore the company did not violate 8(a)-(5) when it withdrew recognition of the Union during the 1964 contract negotiations and strike.

In *Vincent Drugs,* 144 NLRB 1247 (1963), the issue presented was whether the contract unit therein, which was a mixed unit, was an appropriate bargaining unit. It was argued that the Board under no circumstances could find a mixed unit to be appropriate unless the professionals at some time voted for inclusion as provided in 9(b)(1). This thesis was rejected upon the ground that 9(b)(1) was construed as a limitation upon the Board's authority in a section 9 proceeding, and did not preclude a voluntarily established mixed unit.

In *Westinghouse Electric Corp.* v. *NLRB,* 236 F. 2d 939 (C. A. 3, 1956), the issue related to the voluntary inclusion of professionals with nonprofessionals and the effect of 9(b)(1). At p. 943 the court commented:

> ". . . The obvious effect of the proviso is merely a limitation on the Board's power to *create* mixed units." (Emphasis supplied.)

The court further stated, at 944:

> "... the long association of these engineers with the (nonprofessional) salaried unit, their existing contract with the IUE, and the fact that they may at a proper time in the future determine whether they will be included in the (professional) unit, leads us to accept their present exclusion as justified."

It was argued in *Vincent Drug*, as in the instant case, that *Leedom* v. *Kyne* compelled the Board to find that the contract unit was inappropriate. The Board distinguished *Kyne* and said:

> "... the *Kyne* case was not concerned with the validity of an existing contract covering a unit of both professional and nonprofessionals that had been established by the parties, based on an established collective bargaining history which preceded the making of the contract. The precise issue presented in the *Kyne* case was whether such a combined unit could be established initially by Board action in a representation proceeding without first affording the professional employes a self-determination election to authorize their inclusion in such a unit. We therefore find the cited case distinguishable and inapposite.
>
> "In all the circumstances of this case, and considering particularly the long collective bargaining history between the Employer and the Union in contracting on the basis of the combined unit here involved—a history which began some 6 years before the contract in issue was executed—we find no sufficient basis for holding that the contract unit was inappropriate. Nor do we interpret Section 9(b)(1) as requiring us in this proceeding to hold otherwise."

The employer's construction of *Leedom* v. *Kyne* would expand the rule of the case beyond its intent. On two subsequent occasions the Supreme Court has indicated the "extraordinary circumstances" existing in *Leedom* v. *Kyne* and reemphasized the "narrow limits" within which it should be applied. *Boire* v. *Greyhound Corporation*, 376 U. S. 473 (1964) and *Railway Clerks* v. *Employers Ass'n*, 380 U. S. 650 (1965).

The Board and the Court of Appeals quite appropriately concluded that the employer should be estopped from denying the appropriateness of the contract unit in light of the bargaining history regarding the composition of the unit; the failure of the employer to question the unit structure during the years of bargaining; and the withdrawal of recognition during negotiations, after commencement of the 1964 strike and in the face of other unfair labor practices. Both the Board and the Court concluded that the unit in issue was a consensual unit and not a unit "created" by the Board. To conclude otherwise in the instant case would permit one to terminate a relationship when it suits the convenience or purpose of the moment and would thereby permit the manipulation of the Board to defeat the basic objectives of the statute.

Accordingly, it is respectfully submitted that the determination that the historically established contract unit was not inappropriate, was in fact a consensual unit, and adherence to the *Vincent Drug* principles was sound.

2. The Company conceded that its withdrawal of recognition was not predicated upon any good faith doubt as to the union's majority status as bargaining agent in the mixed unit. In light of the recognition extended to the union over the years, there is a presumption of continuance of majority which petitioner did not dispute or seek to rebut. The petitioner may not now assert a doubt it previously conceded did not exist.

No question was raised as to the Union's majority prior to the withdrawal of recognition. To the contrary the record discloses that it was conceded that the Union did represent a majority when the contract negotiations commenced and during the strike up to October 8, 1964, the date of withdrawal of recognition (P110a; P56a, n. 21; P314a to P315a; P255a to P258a). The company's sole basis for its refusal to bargain was predicated upon its erroneous construction and interpretation of *Leedom* v. *Kyne, supra*.

In the face of a continuing bargaining relationship, where an employer has doubts as to his duty to bargain he must petition the Board for relief, while continuing to bargain until the Board has given some indication that the claim has merit. The employer may not justify self-help but is required to follow the Congressional device to determine the question. *Ray Brooks* v. *NLRB*, 348 U. S. 96 (1954). However, good faith doubt as to the majority status of the Union can't be raised in the context of illegal anti-Union activity or other conduct of the employer designed to undermine the Union. *NLRB* v. *Henry Heide*, 219 F. 2d 46 (C. A. 2, 1955), cert. den. 349 U. S. 952.

As noted, it is significant that no evidence was offered by the employer in the Board hearing to refute the Union's majority status as of the withdrawal of recognition. To the contrary, such evidence as was received with respect to majority on October 8, 1964 clearly established proof of majority. In any event, in light of the employer's prior unfair labor practices, any subsequent claimed loss of majority would be rejected and disregarded. *Joy Silk Mills, Inc.* v. *NLRB*, 185 F. 2d 732 (C. A. D. C. 1950), cert. den. 341 U. S. 914; *NLRB* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C. A. 2, 1954); *Bilton Insulation Co.* v. *NLRB*, 297 F. 2d 141 (C. A. 4, 1961).

The attack upon the Union's majority status as bargaining representative is a smoke screen raised after the close

of the NLRB hearing, and after admission of majority status, in an effort to becloud the real issue, to wit, does *Leedom* v. *Kyne* provide legal justification for the refusal to continue to bargain. For the reasons heretofore set forth, we submit it does not.

The issue in the case at bar is whether or not the contract unit was appropriate for collective bargaining. The issue is not whether the Board should give professionals an opportunity to have a self determination election, as in *Leedom* v. *Kyne*. Neither is the validity of the 1951 certification in issue. The contract unit is the product of the parties and is not inherently inappropriate or invalid. To the contrary, Section 9(b)(1) specifically contemplates that such a contract unit may be appropriate.

While a petition for self determination may at some future appropriate time alter this contract unit, the employer may not engage in a course of conduct clearly violative of the statute and then seek to exculpate itself from fulfillment of its statutory duty by rejecting as inappropriate the contract unit it helped to create. To conclude otherwise would make a mockery of statutory obligations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KAPELSOHN, LERNER, LEUCHTER & REITMAN,
Attorneys for Respondent Local 400 International Union of Electrical, Radio & Machine Workers of America, AFL-CIO.

SIDNEY REITMAN,
Of Counsel.

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283-268—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) has not yet been officially reported. The Board's decision and order (Pet. App. 25a–58a) are reported at 159 NLRB No. 145.

JURISDICTION

The decree of the court of appeals was entered on August 31, 1967 (Pet. App. 14a–17a), and a petition for rehearing was denied on September 25, 1967 (Pet. App. 23a–24a). The petition for a writ of certiorari was filed on October 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In 1951, the Board certified the union as the representative of a unit composed of professional and non-professional employees, without first having a separate vote of the professional employees taken to determine whether they desired inclusion in the mixed unit, as provided for in Section 9(b)(1) of the National Labor Relations Act. For more than 13 years thereafter, the employer recognized and bargained with the union as the representative of the professional and non-professional employees in that unit, and entered into successive collective bargaining agreements with the union. The following questions are presented:

1. Whether the Board properly concluded that the employer violated its duty to bargain when, in the midst of negotiations for a new contract, it withdrew recognition from the union on the ground that the original 1951 certification was invalid.[1]

2. Whether there is substantial evidence to support the Board's finding that the employer, when it withdrew recognition, did not have a good faith doubt that the union continued to represent a majority of the employees in the mixed unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in Appendix B to the petition (pp. 101a–102a).

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[1] The same question is presented in the companion case of *Professional Employees of I.T.T. Federal Laboratories, et al.* v. *McCulloch, et al.*, No. 773, this Term.

STATEMENT

Since 1946, I.T.T. Federal Laboratories, a division of petitioner and its predecessor, Federal Telecommunications Laboratories, Inc.[2] (all herein referred to as the "Company"), has bargained with the representatives of a unit of its employees composed of engineers, chemists, and laboratory technicians employed at the Nutley, New Jersey, plant. *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395, 1396.[3] In 1950, Local 400, International Union of Electrical, Radio & Machine Workers, AFL–CIO ("Local 400") petitioned the Board for certification as the exclusive bargaining representative of the engineer-technician unit. The existing bargaining representative (Local 231, see note 3, *supra*) intervened in the proceeding. At that time, there were approximately 150 engineers and chemists, and 60 technicians in the unit. Both Local 400 and Local 231 maintained that the technicians should be retained in the unit on the ground that they were "professional" employees within the

---

[2] In 1951, I.T.T. Federal Laboratories was organized by its parent corporation, International Telephone & Telegraph Corporation, to assume operation of the Nutley, New Jersey, plant involved herein. Prior to 1951, this plant had been operated by Federal Telecommunications Laboratories, a wholly-owned subsidiary of International Telephone and Telegraph (Pet. App. 59a, 60a, n. 4).

[3] The "engineer-technician" unit was first found appropriate in 1945. *Federal Telecommunications Laboratories, Inc.*, 63 NLRB 947, 953–954. No bargaining representative was chosen at that time, but in 1946 the United Office and Professional Workers of America, Local 231 was chosen by the employees and certified as the exclusive bargaining representative of that unit. *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395, 1395–1396.

meaning of Section 2(12) of the Act (29 U.S.C. 152(12)), or, alternatively, were highly skilled employees whose work was completely integrated with that of the engineers and chemists. The Company, however, contended that the technicians were not "professional" employees, that they had a closer community of interest with the employees in the production and maintenance unit, and that, therefore, they should be excluded from the engineer unit.

In the ensuing representation proceeding (*Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395), the Board concluded that, "[u]nder the circumstances, we need not decide whether technicians are professional employees within the meaning of the statutory definition," for, "[a]s all the parties are agreed that the engineers and chemists are professional employees, and the record clearly shows that [the engineering unit] * * * is composed *predominantly* of professional employees within the meaning of Section 2(12) [of the Act] * * *, the technicians may appropriately be included in the professional voting group" (92 NLRB at 1398–1399). Accordingly, the Board conducted an election in the engineer-technician unit, Local 400 received a majority of the votes cast, and was certified as the exclusive bargaining representative of that unit (R.P. 108a, 42a).[4]

In 1951, 1952, 1954, 1956, 1959, and 1961, Local 400 and the Company entered into a series of collective bargaining agreements covering the engineer-techni-

[4] "R.P." refers to petitioner's appendix filed with the court below and "R.B." to the Board's appendix.

cian unit, the last of which expired on September 9, 1964 (R.P. 109a, 43a; R.B. 4b–8b, 11b–12b; G.C. Exhs. 2–A, B, C, 3–C, 4, 5, 6, 13). The 1964 negotiations, which are described below, failed to produce a new agreement and a strike ensued (R.P. 67a; R.B. 72b).

In January 1964, while the 1961–1964 contract was still in effect, Local 400 requested that the Company furnish it with seniority data as to non-unit personnel who might be transferred into the engineer-technician unit (R.P. 45a; 147a–149a, 153a–154a, 333a–334a). The Company refused to supply such information, notifying Local 400 that it would only make available information relating to employees already transferred, and that this information would be published in the Company's semi-monthly personnel bulletin (R.P. 45a–46a; 149a, 150a, 153a–154a). In June 1964, Local 400 also requested that it be provided with the evaluation factors used by the Company in determining which employees in the engineer-technician unit would receive the semi-annual merit increases (R.P. 155a, 157a–158a, 295a–296a).[5] The Company refused to supply that information as well (R.P. 115a; 155a, 344a; R.B. 14b).

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[5] The 1961–1964 contract called for the creation of a fund from which the semi-annual merit increases would be allocated (R.P. 115a, 51a; R.B. 12b, 82b). As to two-thirds of the fund, the Company was required to discuss its proposed allocations, but, if no agreement could be reached as to the recipients, the Company was authorized to put its recommendations into effect (R.P. 115a; R.B. 82b–83b). As to the remaining one-third, union agreement was required, and unresolved disputes were to be submitted to arbitration (R.P. 115a; R.B. 13b, 83b).

Negotiations for a new collective bargaining agreement began on July 20, 1964 (R.P. 63a, 65a; 165a). In the ensuing bargaining sessions, the Company contended that contracts were being lost to competitors because the cost of its fringe benefits was comparatively higher (R.P. 66a, 71a; 171a–172a, 177a–178a, 179a, 212a). Local 400 requested information as to the relation between fringe benefits and the bidding on new contracts, and as to contracts which had been lost because of high fringe benefits (R.P. 71a–74a; 177a–178a; 179a, 211a–212a, 215a–216a, 369a–375a). The Company did not supply such information (R.P. 71a–73a; 180a–181a, 375a). On September 9, 1964, at the expiration of the existing contract, Local 400 called the employees out on strike (Pet. App. 62a).[4]

On October 7, 1964, counsel for certain employees in the engineer-technician unit filed a petition with the Board seeking a decertification election in that segment of the unit which included the engineers, chemists, and spectroscopists, but excluding the technicians and all other employees (R.P. 110a, 44a; 366a, 402a). On the next day, the Company formally withdrew recognition from Local 400 as the representative of the engineer-technician unit, refused to bargain any further with that union insofar as the professional employees were concerned, and filed two representation petitions with the Board (R.P. 110a; 366a, 367a–368a,

[4] On July 19, 1964, Local 400 had filed an unfair labor practice charge with the Board, alleging that the Company had refused to bargain in good faith (R.P. 41a; 8a).

404a, 406a).[7] At the time of its withdrawal of recognition, the Company's records showed that 244 of a total of 460 employees in the engineer-technician unit were still on strike (R.P. 110a; 56a, n. 21; 314a–315a).

In light of these facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish Local 400 with (1) seniority data on non-unit personnel eligible for transfer into the bargaining units; (2) merit-review evaluation data relied on by the Company in determining the recipients of the semi-annual merit increases; and (3) financial and other data bearing on the Company's bargaining claim that the high cost of existing employee benefits was affecting its competitive position and causing it to lose contracts (Pet. App. 27a–29a, 37a–38a, 63a–69a). It further found that the Company solicited two employees to abandon the strike, by means of threats and promises, in violation of Section 8(a)(1) of the Act (Pet. App. 38a–39a, 70a–72a). Finally, the Board (with two Members dissenting) found that the Company violated Section 8(a)(5) and (1) of the Act by conducting negotiations with Local 400 in bad faith in order to avoid reaching an agreement (Pet. App. 37a, n. 16, 87a–88a), and by withdrawing recognition from Local 400 as bargaining representative of the professional employees in the engineer-technician unit (Pet. App. 29a–37a).

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[7] One petition sought an election among the same employees set forth in the decertification petition previously filed, and the other an election in the entire unit (Pet. App. 32a–35a; R.P. 404a, 406a). All three petitions were dismissed by the Board because of the pendency of the unfair labor practice proceeding (Pet. App. 33a, n. 13).

In arriving at the latter conclusion, the Board assumed, *arguendo,* as the Company contended, that the original 1951 certification of Local 400 was invalid because the professional employees were never accorded a separate vote on whether they wanted to be included in the mixed unit, as Section 9(b)(1) of the Act requires (Pet. App. 33a).[8] The Board held that Section 9(b)(1), "although precluding *the Board* itself from initially establishing such a mixed unit in a representation proceeding without a self-determination election, does not preclude an *employer and a union* from voluntarily establishing and maintaining such a unit as one appropriate for collective bargaining" (Pet. App. 34a). Thus, the Board found that the Company, in the intervening 13 years, had developed a consensual bargaining relationship with the mixed unit, and that this factor, coupled with the timing and context of the Company's attempt to withdraw recognition from that unit, estopped it, at that time, from disputing the appropriateness of the unit (Pet. App. 36a–37a).[9]

Accordingly, the Board ordered the Company to cease and desist from the unfair labor practices found; to make available the seniority, merit-review, and

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[8] Section 9(b)(1) provides that "[t]he Board shall not decide that any unit is appropriate for [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *."

[9] The Board specifically noted that its holding did not foreclose the professionals in the unit from seeking a self-determination election under Section 9(b)(1) at an appropriate time after the Company's unfair labor practices had been remedied (Pet. App. 36a, n. 15).

financial and other data previously withheld; and, upon request, to bargain collectively with Local 400 (Pet. App. 39a–42a).

The court of appeals agreed with the Board that the parties, in light of their post-1951 relations, had consented to the appropriateness of a mixed bargaining unit consisting of professional and non-professional employees; and hence that, in the particular circumstances of this case, whatever defect had existed in the original 1951 certification did not justify the Company's present refusal to bargain with Local 400 (Pet. App. 4a–5a). The court below, with minor modifications not pertinent here, sustained the Board's unfair labor practice findings and enforced its order (Pet. 13a).[10]

ARGUMENT

1. The facts summarized in the Statement (*supra*, pp. 3–7) show that, for more than 13 years, the Company recognized and bargained with Local 400 as the representative of the employees in a unit which contained both professional and non-professional employees, and entered into a series of collective agreements with Local 400 covering that unit; that, at the outset of the 1964 contract negotiations, the Company

[10] The court modified that portion of the Board's order requiring the Company to provide Local 400 with blanket seniority data of non-unit personnel. As modified, however, the Company was still required to disclose data on the seniority status of non-unit employees about to be transferred into the unit (Pet. App. 7a–9a). Except for the finding relating to the withdrawal of recognition of the union as the representative of the mixed unit, the Company does not here challenge the court's action in sustaining the Board's unfair labor practice findings.

continued to recognize Local 400 and the appropriateness of the engineer-technician unit; and that the Company did not withdraw recognition and challenge the composition of that unit until after Local 400 had called a strike and the Company itself had engaged in other unfair labor practices. The basic question presented by the instant petition is whether, in these unique circumstances, the Board properly concluded that the Act did not authorize the Company to terminate its bargaining relationship with Local 400 on the claim that the Board election in 1951, in which Local 400 first gained its representative status, was defective. So viewed, it seems clear that the Board's resolution of this narrow question is correct and presents no issue of continuing importance warranting review by this Court.

As the court below pointed out (Pet. App. 4a), although "section 9(b)(1) prohibits the Board from designating a mixed unit without holding the requisite election of professionals, nothing in the language of the Act prohibits the relevant parties from maintaining and recognizing such a unit consensually."[11] See *Retail Clerks Union Local 324* (*Vincent Drugs*), 144 NLRB 1247. Although Local 400's initial representative status, on behalf of the mixed unit, stemmed from the 1951 Board election and certification,[12] the record

[11] It is clear that a bargaining relationship and obligation may be established by means other than a Board election and certification. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71–72.

[12] Even before 1951 an engineer-technician unit had existed, and the Company had bargained with another union which then represented the employees included in that unit (*supra*, p. 3).

shows that at no time betwen 1951 and 1964 did either the Company or the professional employees challenge the composition of the unit or seek its decertification. Rather, the Company continued to recognize Local 400 as the bargaining representative for the mixed unit,[13] and entered into a series of collective agreements with it—thereby explicitly acknowledging the acceptability to the Company of the mixed-unit representation. In these circumstances, as the court below found (Pet. App. 5a), the Board was justified in concluding that the parties had established "a consensual arrangement" here, and that therefore "the error in the original determination of the bargaining unit does not justify the present refusal to bargain with it."

Leedom v. *Kyne*, 358 U.S. 184, does not require a contrary conclusion. In that case, the Court held that the district court had jurisdiction of a suit brought by a union of professional employes to set aside the Board's action in certifying that union as the representative of a mixed unit of professional and non-professional employees, where the Board had not afforded the professionals a separate vote on whether they desired inclusion with the non-professionals, as contemplated by Section 9(b)(1). Noting that the Board did not contest the trial court's conclusion that it "had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees" (358 U.S. at 187), the Court con-

[13] This recognition continued even after the 1958 decision in *Leedom* v. *Kyne*, 358 U.S. 184, discussed *infra*, as noted by the court below (Pet. App. 5a).

cluded that the suit could be maintained, for "'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means within their control * * * to protect and enforce that right" (*id.* at 190).

Here, on the other hand, the Board did not rely on the original certification of Local 400, which arguably is defective under Section 9(b)(1), but on the fact that the parties, by their conduct over the years, have substituted for that certification a consensual bargaining relationship which is not necessarily subject to the restrictions of that section. Moreover, unlike *Kyne,* the Board's holding that the Company may not at this time withdraw recognition from Local 400 does not have the effect of obliterating the right of the professional employees to vote on whether they wish to be in a unit that includes non-professionals. The Board specifically noted (Pet. App. 36a, n. 15) that its decision "is not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time and in the appropriate proceeding." Although the Board added that (*ibid.*) "now is not an appropriate time," that is only because the Company has committed unfair labor practices which must be remedied before a fair election can be held.[14]

2. Petitioner further contends (Pet. 11–12) that its withdrawal of recognition from Local 400 was in any

[14] It is within the Board's discretion to defer the holding of an election until unfair labor practices which could have an effect on the election have been remedied. See *Suprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396 (C.A. 1).

event justified because it had a good faith doubt that Local 400 continued to represent a majority of employees. This presents only an evidentiary issue which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. Moreover, as the court below concluded (Pet. App. 5a–6a), there was ample support for the Board's finding that the Company did not have a good faith doubt as to Local 400's majority status.[15]

---

[15] The cases cited by petitioner (Pet. 11) are inapposite. For example, *United States Molded Shapes*, 141 NLRB 357, involved a first attempt to establish a bargaining relationship, upon the union's demand for recognition and claim of majority status. In such a situation it is incumbent on the General Counsel to prove that the union did in fact represent a majority of the employees. But where, as here, the employer withdraws recognition from an existing bargaining representative, he must show a reasonable basis for his asserted good faith belief that the union no longer represents a majority of the employees. *Celanese Corporation of America*, 95 NLRB 664, 671–675, cited with approval in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104; *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5). In the instant case, petitioner not only failed to adduce any evidence that it had a good faith doubt of Local 400's majority, but the record shows that it was aware that, at the time it withdrew recognition, a majority of the employees supported the strike (*supra*, pp. 6–7).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, A MARYLAND CORPORATION,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

Preliminary Statement

The opinions below, the statement of the grounds on which the jurisdiction of this Court is invoked, the questions presented for review, the statutory provisions which the case involves, and the statement of the case are set forth in full in the Petition for Writ of Certiorari filed by petitioner herein.

Argument

1. In its Brief in Opposition filed herein, the National Labor Relations Board asserts that the circumstances of the case at bar are "unique" and that the case therefore involves a "narrow question" and presents "no issue of continuing importance warranting review by this Court."

This assertion is directly contradicted, and the critical importance of the case at bar is underscored, by the Board's use of this case in *A. O. Smith Corp.*, 166 N.L.R.B. No. 98, 1967 CCH NLRB ¶ 21,666 (1967), to permit the addition, to an existing mixed professional-nonprofessional unit, of new categories of nonprofessional employees, even though the professional employees in the unit have never been accorded an opportunity for a self-determination election under Section 9(b)(1) of the Act.

The Board arrived at this conclusion, moreover, in the face of its prior decision in *Lockheed Aircraft Corporation*, 155 N.L.R.B. 702 (1965), where it held that Section 9(b)(1) precludes it from permitting a union to add professional employees to a mixed unit (by way of a petition for clarification of the unit) on the express ground that "Section 9(b)(1) precludes the Board's granting the relief sought," because the existing unit, although "certified before the passage of Section 9(b)(1) in 1947, includes both professional and non-professional employees," and "was established without a separate ballot among the professionals" (155 N.L.R.B. at 713). This holding has been reaffirmed by the Board as recently as November 15, 1967, in *Gibbs & Cox, Inc.*, 168 N.L.R.B. No. 42, 1968-1 CCH NLRB ¶ 21,911 (1967).

The Board's decision in the *Lockheed* case is of particular significance inasmuch as the Board expressly rejected therein any distinction between "certified" and "consensual" units, noting that "for clarification purposes the Board does not now distinguish between Board-created units and those arising solely by contract" (155 N.L.R.B. at 713 n. 16). For this proposition, the Board cited its prior decision in *Brotherhood of Locomotive Firemen & Enginemen*, 145 N.L.R.B. 1521 (1964), in which the Board, reversing its own prior decision in *The Bell Telephone Company of Pennsylvania*, 118 N.L.R.B. 371 (1957), expressly held that it had authority to make additions to uncertified as well as certified units.

The net result is a crazy-quilt of distinctions superimposed upon distinctions: The Board recognizes in Section 8(a) (5) proceedings a distinction between "certified" and "consensual" units which it does not recognize in clarification proceedings to add to existing bargaining units; and a union, though barred from adding new categories of professional employees, will be permitted to add an unlimited number of nonprofessional employees to a mixed unit in which the professional employees have never been accorded an opportunity for self-determination under Section 9(b)(1).

The Board's use of the case at bar as authority for the last-cited proposition in the *A. O. Smith* case, *supra,* is squarely inconsistent with the Congressional intention underlying Section 9(b)(1) and with the rationale of this Court's decision in *Leedom* v. *Kyne,* 358 U.S. 184 (1958). To add non-professional employees to an already mixed unit will inevitably result in a dilution of the position of the professional employees in the unit *vis-a-vis* the non-professionals, with the result that professional employees who may previously have predominated in a mixed unit created—whether by certification or bargaining—without their having been afforded an opportunity for self-determination, could suddenly find themselves in a distinct minority within the mixed unit and effectively locked into it, unable to secure the self-determination Congress intended they should have.[1]

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[1] Despite the Board's constant assurances herein that "at an appropriate time" the professional employees would have an opportunity to seek to decertify the Union, it is to be noted that the Board has never granted professional employees the right to maintain decertification proceedings except in the overall mixed unit, which would require a showing of the support of 30% of the membership of the overall mixed unit merely to have the Board entertain a decertification petition. *Westinghouse Electric Corporation,* 129 N.L.R.B. 846 (1960). In fact, the Regional Director dismissed the decertification petition filed by the professional employees herein on that very ground.

The fact that this result would be achieved by the Board on the strength of the decisions below demonstrates persuasively the critical importance of the issues presented in the case at bar. If the decision below is permitted to stand, the result must inevitably be the erosion of Section 9(b)(1) and of this Court's decision in *Leedom v. Kyne*.

2. In its Brief in Opposition herein, the Board erroneously characterizes petitioner's second argument as a contention by petitioner that it had a good-faith doubt as to Local 400's majority status, from which the Board concludes that the argument "presents only an evidentiary issue which does not warrant review by this Court." The same characterization is found in the Union's Brief in Opposition.

In fact, petitioner's contention was and is that the Board failed to present *any* evidence that Local 400 at any time represented a majority of the employees in the mixed unit. The fact that the vast majority of the professional employees in the mixed unit—although just short of a majority of the overall unit—had abandoned the strike prior to petitioner's withdrawal of recognition certainly does not stand as either a concession or proof of majority status. *Norlee Togs, Inc.*, 129 N.L.R.B. 14 (1960); *United Transports, Inc.*, 123 N.L.R.B. 668, 680 (1959); *McGough Bakeries Corp.*, 58 N.L.R.B. 849, 853 (1944), modified as to another point and enforced, 153 F. 2d 420 (5th Cir. 1946).

Since the Board cannot and admittedly does not rely upon the illegal and void 1951 certification as a source of any presumption of majority status, this is simply a case of the clear-cut failure on the part of the Board to meet its burden of proving majority status, which is an indispensable requirement of a finding of an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act. The mere fact that petitioner and Local 400 entered

into intervening collective bargaining agreements does not fill this void. *Cf. International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 71 (1961).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for a Writ of Certiorari herein, said Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 773

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation, WILLIAM P. LaPLANT, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

vs.

FRANK W. McCULLOCH, *et al.*, being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a division of International Telephone and Telegraph Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Sec. 9 (b) (1) 3, 6

5 U.S.C.:

Sec. 1009 8

28 U.S.C.:

Sec. 159 (b) (1) 3

Sec. 1254(1) 3

Sec. 1337 8

29 U.S.C.:

Sec. 2 (3) (12) 14fn

Sec. 141 8

Sec. 152 (12) 5

Sec. 152 (3) (12) 14fn

Sec. 159 (b) (1) 4, 5, 8

Sec. 160 (e), (f) 8

Other Authorities Cited

Cong. Rec., April 23, 1947, 2 Leg. Hist. 1009 ..... 14fn

Hearings, Senate Committee, 1705, House Committee, 2785-2786 ..... 14fn

Senate Report No. 105, 80th Congress, 1st Sess. 1 Leg. Hist, 417 ..... 14fn

IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No.

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation, WILLIAM P. LAPLANT, *et al*, on behalf of themselves and all other persons similarly situated,

Petitioners,

vs.

FRANK W. MCCULLOCH, *et al*, being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a division of International Telephone and Telegraph Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

Petitioners pray that a Writ of Certiorari issue to review two judgments of the United States Court of Appeals for

the Third Circuit, both involving identical or closely related questions:

Case No. 15,609 (hereinafter referred to as the "District Court Case") wherein Petitioners were Plaintiffs-Appellants below.

Case No. 16,012 (hereinafter referred to as the "N.L.R.B. Case") wherein Petitioners were Party Intervenors below.

The Opinions Below

a. The District Court Case:

The United States District Court for the District of New Jersey filed its opinion March 29, 1965 (51 L.C. 19,606; 58 L.R.R.M. 2835; not officially reported) (see Appendix A). The Court of Appeals filed its opinion July 31, 1967 (see Appendix B) which is not yet officially reported.

b. The N.L.R.B. Case:

The N.L.R.B. Trial Examiner's decision was made April 15, 1965 (see Appendix C). The National Labor Relations Board's decision and order was made on June 29, 1966 (see Appendix D) which is reported at 159 NLRB No. 145. The Court of Appeals filed its opinion on July 31, 1967 (see Appendix E) which is not yet officially reported.

Jurisdiction

In the District Court Case, the judgment of the Court of Appeals was made and entered July 31, 1967.

In the N.L.R.B. Case, the judgment of the Court of Appeals was made and entered August 31, 1967, and an order denying the Petition of the Employer for a rehearing was made and entered September 25, 1967.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Questions Presented

Where the National Labor Relations Board has admittedly certified a mixed unit of professional and nonprofessional employees in excess of its statutory authority without affording the professional employees the right to a self-determination election guaranteed by Section 9 (b) (1) of the National Labor Relations Act:

1. Does not the District Court have jurisdiction under *Leedom* v. *Kyne*, 358 U. S. 184 (1958), to entertain a suit by the Professional Employees affected to declare the certification void and to set aside the exclusive bargaining agency now exercised by the Union?

2. Can the Professional Employees in said unit be estopped from seeking relief from the illegal certification and the exclusive bargaining agency exercised by the Union by reason of Union-Employer bargaining conduct subsequent to said illegal certification?

3. Should not the decisions of the Court of Appeals herein be reversed because of their conflict with the holdings of this Court in *Leedom* v. *Kyne*, 358 U. S. 184 (1958) and *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961)?

Statute Involved

The provision of the National Labor Relations Act of 1947, as amended, involved herein is Section 9 (b) (1) of the Act, 28 U.S.C. 159 (b) (1), as follows:

"Section 159. * * *

"* * * *

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom

in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *"

Statement of the Case

These cases arise from the certification by Respondent, National Labor Relations Board (hereinafter "N.L.R.B.") of the Respondent, Local 400, International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter "Local 400") as the collective bargaining representative for a mixed unit of Professional Employees and Technicians without first affording the Professional Employees their right of a self-determination election pursuant to Section 9(b)(1) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. 159(b)(1).

The essence of the matters presented herein involves the current representative status of Local 400 of the mixed professional and nonprofessional unit, so illegally established by the N.L.R.B.

A. Proceedings Below

In the District Court case Petitioners' complaint seeking relief from such certification as invalid was dismissed for lack of jurisdiction of the subject matter on motion of the N.L.R.B. made at the commencement of the case. The Court of Appeals affirmed.

The N.L.R.B. case arises from unfair labor practice charges made by Local 400 against Respondent International Telephone & Telegraph Federal Laboratories, a division of International Telephone & Telegraph Corporation (hereinafter "I.T.T.F.L.") when recognition of the mixed unit herein was withdrawn by I.T.T.F.L. on the basis of the illegal certification.

The Trial Examiner hearing the unfair labor practice charges, *inter alia,* relating to I.T.T.F.L.'s withdrawal of recognition, found the mixed unit invalid and recommended dismissal of the charge. (N.L.R.B. Case Nos. 22-CA-2015 and 2-CA-2131—see Appendix C). The N.L.R.B. in reviewing the Trial Examiner's decision, consolidated for determination a Petition for Revocation of Certification filed by Petitioners herein bearing N.L.R.B. Case No. 2-RC-2282, and reversed the decision of the Trial Examiner as to the mixed unit, and denied the Petition for Revocation of Certification as "moot". In a dissenting opinion two Board Members held that the decision of the Trial Examiner as to the mixed unit should be affirmed and the Petition for Revocation of Certification should be granted.

On Petition of I.T.T.F.L. for review and Cross-Petition of the N.L.R.B. for enforcement, and after Petitioners joined as party intervenors, the Court of Appeals in substance affirmed the majority holding of the N.L.R.B. on the mixed unit issue and granted enforcement.

B. Factual Background

In the 1951 certification proceeding [*Federal Telecommunications Laboratories, Inc.,* 92 NLRB 1395 (1951)] I.T.T.F.L. objected to the inclusion of certain technicians in the unit who it contended were not professional employees within the statutory definition (29 U.S.C. 152 (12)), unless the professional employees were first afforded a self-determination election as provided in 29 U.S.C. 159 (b) (1). The N.L.R.B., however, deemed it

unnecessary to hold a self-determination election, or to determine the exact status of the alleged non-professionals, because the professional employees constituted a majority of the proposed unit and in such circumstance it did not consider itself required to conduct a self-determination election amongst the professional employees.

While the N.L.R.B. failed to make any specific determination with respect to the techincians' status in 1951, it is now conceded by the N.L.R.B. and the Union that the techincians are not professional employees within the definition of the Act (See Footnote 12—P72a) and that the certification violated Section 9(b)1 of the Act.

On the basis of such certification, recognition was granted by I.T.T.F.L. to Local 400 and successive collective bargaining agreements were negotiated and entered into in 1951, 1952, 1954, 1956, 1959 and 1961, the last agreement expiring on September 9, 1964. Upon the expiration of such agreement, Local 400 commenced a strike against I.T.T.F.L. and on October 7, 1964 Petitioners filed a decertification petition with the N.L.R.B. supported by authorizations obtained from more than 30% of the professional employees within the unit. Accompanying this petition was a letter of Petitioners' counsel explaining that Petitioners did not intend by such decertification petition to admit the validity of the mixed unit, but in fact, contended it was illegally certified, and was only filed to obtain an opportunity for a self-determination election previously illegally denied.

This decertification petition was dismissed by the Regional Director on October 30, 1964 and upon appeal the N.L.R.B. affirmed the dismissal, citing the pending unfair labor practice complaints in Cases 22-CA-2015 and 22-CA-2131 against the employer as grounds for blocking such petition. These unfair labor practice charges formed the basis of the N.L.R.B. case here sought to be reviewed.

The day after the Professional Employees filed their decertification petition, at which time a majority of the Professional Employees were reporting for work and no longer supporting the strike, I.T.T.F.L. notified Local 400 that because of the representation question as to the professionals, it would continue to bargain only as to the non-professional segment of the mixed unit, and filed two representation petitions with the N.L.R.B. seeking alternative elections of the employees within the mixed unit, one as to the entire unit and one as to the professional segment thereof.

As a result of the Employer's withdrawal of recognition as to the Professionals, Local 400 filed a charge with the N.L.R.B. alleging this withdrawal as an unfair labor practice. On November 10, 1964 the N.L.R.B. issued an amended complaint against the Employer incorporating this charge together with others.

Like Petitioners decertification petition, the election petitions of I.T.T.F.L. were dismissed because of the pending unfair labor practice proceedings. The hearing on the unfair labor practice charges commenced on December 16, 1964 and closed January 8, 1965.

During the unfair labor practice hearing, in the afternoon session on December 16, 1964, the Trial Examiner indicated that counsel for Petitioners should be requested to attend and participate in the hearing. After some discussion, the Trial Examiner personally telephoned Petitioners' counsel extending an invitation to participate. Petitioners' counsel by letter dated December 17, 1964 to the Trial Examiner declined the invitation explaining why he did not consider intervention appropriate under the circumstances, pointing out that such proceeding would only subject the rights of the Professional Engineers to a union-employer controversy involving many problems not relevant

to their position. Moreover, Petitioners' counsel stressed the dismisal of the Professional Employees decertification petition and stated the already determined position of the engineers to seek redress in the Courts.

On December 21, 1964 the Professional Employees instituted their action in the United States District Court for the District of New Jersey, which together with the N.L.R.B. case culminated in the judgments now sought to be reversed by this Petition.

After the District Court's Opinion dismissing Petitioners' Complaint on March 29, 1965, Petitioners filed a Petition for Revocation of Certification with the Board on April 3, 1965, which Petition was consolidated with the unfair labor practice case against the Employer and dismissed by the Board in its decision on these matters (P79a).

C. Federal Jurisdiction

Federal court jurisdiction in this matter is invoked under 28 U.S.C. 1337, the cause involving rights under the National Labor Relations Act of 1947, as amended, 29 U.S.C. 141, *et seq.*, an Act of Congress regulating commerce; under general equity jurisdiction; under 5 U.S.C. 1009, to review an action of an administrative agency, the N.L.R.B.; and under 29 U.S.C. 160 (e) and (f).

Reasons for Granting the Writ

The 1951 N.L.R.B. certification [*Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395 (1951)] of the mixed Engineer-Technician unit here involved issued despite the timely objection of the Employer without first affording the Professional Employees their statutory right of self-determination guaranteed under 29 U.S.C. 159(b)(1). This provision affords professional em-

ployees the right to determine by majority vote amongst themselves whether or not they choose to be included in a unit with non-professional employees. Only if they so choose, is the N.L.R.B. at liberty to certify a mixed unit. The N.L.R.B., the Union and the Employer all concede the illegality of the certification in the instant case.

Perforce this illegality must be recognized because of the holding of this Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958) wherein this Court said at pp. 188-189:

> "Section 9(b)(1) is clear and mandatory. It says that, in determining the unit appropriate for the purposes of collective bargaining, 'the Board SHALL NOT (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.' (Emphasis added). Yet the Board included in the unit employees whom it found were not professional employees, after refusing to determine whether a majority of the professional employees would 'vote for inclusion in such unit'. Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

Clearly then, since *Leedom* v. *Kyne*, the District Court had jurisdiction to entertain a suit by Petitioners to strike down the illegal mixed unit certification. Thus, dismissal of Petitioners' complaint herein by the District Court for lack

of jurisdiction and the affirmance thereof by the Court of Appeals are in direct conflict with the decision of this Court in *Leedom* v. *Kyne*.

This result follows despite the attempt by the District Court and the Court of Appeals to equate an informal invitation by the Trial Examiner to Petitioners to participate in the proceeding against the Employer (after hearings were already in progress), with an absolute right to a Board hearing and judicial review of their complaints.

Assuming, *arguendo*, that such forum was assured, was the jurisdiction of the District Court to entertain Petitioners' suit thereby ousted? This Court has already answered the question in the negative in *Leedom* v. *Kyne* saying, at p. 188:

> "This case, in its posture before us, involved 'unlawful action of the Board (which) has inflicted an injury on the (respondent).' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

We are here presented with a truly anomalous situation. The intention of Congress to guarantee professional employees the right, if they so desire, to have a collective bargaining unit containing solely professional employees is clear and unmistakable. Moreover, a mandatory duty was imposed by Congress upon the N.L.R.B. to afford this right. Yet the N.L.R.B. formulated a policy deeming it unneces-

sary to afford a self-determination vote when professional employees constituted the majority in a mixed unit. This policy was erroneous and struck down by this Court in *Leedom* v. *Kyne*. However, the Board persists in perpetuating its error, despite its role as guardian of employee rights. As observed in *Shoreline Enterprises of America* v. *N.L.R.B.*, 262 F. 2d 933 (C. A. 5, 1959), at Page 942:

> "The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It is also a guardian of individual employees. Their voice, though still and small, commands a hearing. The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen's interest in selecting a political representative."

Inescapably confronted, as a matter of law, with the illegality of its certification of the mixed unit, the N.L.R.B. has performed a sleight of hand with the facts herein. It has developed a "consensual" theory to give respectability to the current Union-Employer relationship.[1] This theory relies on an inference drawn from the fact that following the Board's illegal certification, the Union and the Employer contracted with respect to the mixed unit. However, this conduct is equally consistent with a continued recognition based on the original illegal certification, as with transformation to a consensual arrangement. Thus, the normal presumption of continuity would necessarily infer a continued recognition of the original illegal certification.

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[1] Cf. *contra—Garment Workers* v. *N.L.R.B.*, 366 U. S. 731 (1961).

In support of this consensual theory the N.L.R.B. and the Court of Appeals attaches significance to the history of this mixed unit prior to 1951. This history is of no consequence as can be seen from the *Leedom* v. *Kyne* case where this Court completely ignored a similar past bargaining history, as reflected in the District Court opinion. 148 F. Supp. 597, 600 (D. D. C. 1956).

The N.L.R.B. and the Court of Appeals also attached significance to the fact that the Employer continued to contract in 1959 and 1961 after the *Leedom* v. *Kyne* decision rendered in December, 1958 and construed the Employer's *silence* on this issue to mean that the Employer intended thereby to cease recognition under the Board's illegal certification, and transformed recognition to a consensual basis, overlooking any number of other equally possible reasons for its silence, such as a desire to avoid a clash with the Union or reluctance to become involved in a strike or litigation, etc.

In fact, the acts of all parties *in 1964* were based on the continuity of the certification. The employees started proceedings to set aside the illegal certification, the Employer withdrew recognition because of the illegal certification, and the Union filed the very charges involved herein with the Board *proclaiming itself the duly certified representative* of the mixed unit. Moreover the Board, itself, issued an amended complaint alleging the unit to be *certified.* All of these acts belie the current Board theory of consensuality!

Additionally, this transformation theory of the Board of necessity superimposes the will of the Employer and Union upon these Petitioners without their consent. Such maltreatment which violates the Congressional chartered course protecting these individual rights, warrants the pronouncement of this Court.

While one would think the N.L.R.B. would be estopped from perpetuating its own unlawful act, the Employer by its silence on this question is now deemed estopped from complaining about this illegality, which estoppel by some invisible connection is imputed to the Professonal Employees in total disregard of their position, which is completely different and distinct from that of the Employer.

As a matter of fact, it was this precise concern, that employers most likely would do nothing to challenge an illegally certified mixed unit, that impelled the Court of Appeals in *Leedom* v. *Kyne* (249 F. 2d 490, 492) to hold that the District Court had jurisdiction to entertain employees' suits. Here, this very factor which was deemed to vest jurisdiction in the District Court in *Leedom* v. *Kyne* to set aside that illegal certification, is being used to estop the Professional Employees herein from obtaining relief from their illegal certification. The patent injustice of this course to Petitioners is crystal clear and in all fairness requires this Court's consideration.

The failure to remedy the wrong here complained of leads to further legal consequences that compound the injury already done these Petitioners. Despite the Court of Appeals and the Board stating that their decisions do not foreclose Petitioners from a self-determination election at some future date under appropriate circumstances, these "appropriate circumstances" are the very same circumstances required for decertification of any mixed unit *legally certified in the first instance.* Hence, the Board and Court are in effect saying to Petitioners that there is no remedy for the denial of your statutory rights in the past but if future circumstances develop where these rights are involved, they will not be denied again. This is bad enough, but this is not all. The injustice rolls on.

In order for Petitioners to exercise their right of self-determination an extraordinary burden is placed upon

them. First, this right may be delayed up to three years under the Board's contract bar rules, assuming the parties herein execute a collective bargaining agreement, which most likely will ensue if the Employer is compelled to bargain with the Union for this mixed unit. Secondly, in order to obtain a decertification election under Board rules, Petitioners must procure the support of 30% of the entire mixed unit, including non-professionals, a burden which would not exist but for the original invalid certification.[2] Applying this Board requirement to a validly certified mixed unit is open to serious question itself without superimposing it on an illegal unit. Suffice it to say, the application of this rule to such an important principle as self-determination for professional employees, so well supported by legislative history,[3] not only dilutes and denies the rights of professional employees but compounds the error committed by the Board initially in the instant unit.

Failure to remedy wrongs as presented herein, only breeds frustration and lack of confidence in our administrative agencies. The experience of Petitioners is a prime

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[2] Note, if a unit is comprised of 300 persons, 200 professional and 100 non-professional, 30% of 200 is 60 whereas 30% of 300 is 90. Thus, to obtain an opportunity to vote by way of decertification, the burden becomes 50% heavier for professional employees using the Board approach. Of course, if the reverse were the case, namely 200 non-professionals and 100 professionals, almost the entire 100 professionals would be needed to file a petition for decertification. Indeed, if there were 225 non-professionals and 75 professionals, *not even the unanimous petition of all professional employees* would be recognized by the Board to establish an election because they would merely represent a segment of the existing unit.

[3] Senate Report No. 105, 80th Congress, 1st Sess. 1 Leg. Hist. 417; Cong. Rec. April 23, 1947, 2 Leg. Hist. 1009; Hearings, Senate Committee at 1705, House Committee at 2785-86; Compare Sections 2, (3) and (12) of the Act, 29 U.S.C. Sec. 152 (3) and (12).

example. There being no regular procedure within the N.L.R.B. for setting aside the illegal certification, Petitioners tried the closest existing procedure, a decertification petition. This was summarily dismissed. Resort was then had to the District Court which failed on jurisdictional grounds. Out of desperation Petitioners devised a procedure not provided for by the N.L.R.B. rules, a Petition for Revocation of Certification, an obviously necessary type petition under the circumstances. The N.L.R.B. dismissed this petition as "moot", finding that the conduct of the Union and the Employer in some way legitimized the mixed unit subsequent to the N.L.R.B.'s illegal certification. The net result takes a right guaranteed by Congress to professional employees and allows other parties, the Union and the Employer, to provide the basis for blocking a remedy of that wrong. As so ably put by Board Members Fanning and Jenkins in their dissent (P92a):

> "Accordingly, we do not agree with the majority that the Respondent and the professional employees are now estopped from disputing the appropriateness of a unit which was admittedly illegitimate at birth and which could not, in our view, thereafter achieve the respectability now sought to be thrust upon it. . . . There is no statute of limitations either proscribed or authorized to be imposed by Section 9(b)(1), nor can the public policy inherent in a self-determination election for professionals be the subject of waiver or estoppel of the parties."

In sum, the cloak of authority illegally granted the Union by the N.L.R.B. should not be allowed to serve as a stepping stone to elevate the Union to a lawful representative status. Nor should the bargaining conduct between the Union and the Employer be allowed to frustrate the free exercise of the professional employees' right of self-determination.

As so aptly put by this Court in *Garment Workers* v. *NLRB*, at p. 738:

> "... To countenance such an excuse [good faith belief] would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives."

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted to correct and settle the conflict between the Court of Appeals decisions herein with the decisions of this Court in *Leedom* v. *Kyne* and *Garment Workers* v. *NLRB*. A vital question of federal law of real and practical importance to Petitioners and those similarly situated is here presented, requiring the intercession of this Court in order to uphold and preserve statutorily guaranteed rights and to prevent N.L.R.B. circumvention of the pronouncements of this Court and Congress.

Respectfully submitted,

APRUZZESE & MCDERMOTT,
By: VINCENT J. APRUZZESE,
A Partner,
Attorneys for Petitioners.

MERRITT T. VISCARDI,
Of Counsel.

VINCENT J. APRUZZESE,
On the Petition.

APPENDIX A

Opinion of Coolahan, U. S. D. J.

(Filed—March 29, 1965)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION No. 1127-64

WILLIAM P. LAPLANT, JOHN R. ATTWOOLL, G. J. BOEHM, T. F. BUCK, JAMES M. CLARK, WILLIAM R. FRAZIER, JR., T. N. GRIFFITH, JR., RAYMOND E. HARRISON, BRUCE LAGER, CHARLES A. PANSARASA, CHARLES J. STUPPI, JR., PHILIP H. IANNENHOLZ, JOHN V. WILDING, DANIEL E. WYATT, I. L. FLETCHER, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

FRANK W. MCCULLOCH, Chairman, BOYD STEWART LEEDOM, JOHN H. FANNING, GERALD A. BROWN, HOWARD JENKINS, JR., being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, an agency of the United States of America, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a division of International Telephone & Telegraph Corporation,

Defendants.

Appearances:

VINCENT J. APRUZZESE, Esq.,
Attorney for Plaintiffs.

Appendix A

CARPENTER, BENNETT & MORRISSEY, Esqs.,
Attorneys for Defendant, I.T.T., Federal Laboratories.,
By: JAMES D. CARPENTER, Esq., and LAURENCE REICH, Esq.

SIDNEY REITMAN, Esq.,
Attorney for Local 400.

SOLOMON HIRST, Esq.,
Attorney for National Labor Relations Board.

COOLAHAN, District Judge.

This case was opened to the Court by an order to show cause brought on behalf of certain professional employees employed by defendant, I.T.&T. Federal Laboratories. Plaintiffs are members of a bargaining unit referred to as the Engineer-Technician unit composed of 340 professional engineers and 109 non-professional technicians. This unit came into being under an N.L.R.B. certification election conducted by the Board in 1951. Local 400 International Union of Electrical, Radio & Machine Workers, AFL-CIO a co-defendant herein was elected exclusive bargaining representative for the unit. Also made a party defendan to the instant action is the N.L.R.B.

Local 400 has entered into a series of collective bargaining agreements for this unit throughout the period of its certification, the last of which contracts expired on September 9, 1964. On June 19, 1964 the Union filed an unfair labor practice with the Board alleging that the company was not bargaining in good faith and on September 15, 1964 a complaint issued against the company on that charge. On October 7, 1964 a group of employees in the unit represented by plaintiffs' counsel in the instant case

filed with the Board a petition seeking a decertification election in a segment of the unit consisting of "engineers in all categories, chemists in all categories and spectroscopists in all categories but excluding senior technicians and technicians A, B and C and all other employees, guards and supervisors as defined by the Act." Contemporaneously with the filing of this petition most of the engineers comprising the bargaining unit abandoned a strike then in progress against the company and returned to work. The company then formally withdrew recognition of the Union as a representative of this unit and refused to bargain with them in that regard. The company itself filed two decertification petitions with the Board seeking first an election among the employees set forth in the petition filed by plaintiffs' counsel, and the second seeking an election of the unit covered by the recently expired contract.

As a result of this turn of events the Union filed an additional unfair labor practice on October 9, 1964. On October 30, 1964 the Regional Director dismissed all three decertification petitions. The employee group and the company appealed to the Board and while the application was pending the Regional Director issued an amended consolidated complaint on the basis of the unfair labor practice charge recently filed. In its answer to the charges of the amended complaint the company alleged that the Engineer-Technician unit was an unlawfully constituted body. On December 9, 1964 the Board sustained the Regional Director's dismissal of the decertification petitions and stated that his decision was warranted in view of the pending unfair labor practice complaint.

On December 16, 1964 the trial examiner conducting the hearing in the unfair labor practice case discussed the matter with Mr. Apruzzese as counsel for the petitioning em-

ployees and requested that he intervene on behalf of his clients. This invitation was declined and the instant action instituted. The hearing was still in progress at the time of the submission and argument of this case.

This Court heard the matter upon oral argument, after allowing all parties involved to file briefs. At that time the matter was taken under advisement to allow for further study of the authority and affidavits presented as well as for the transcript of the argument to be prepared.

It is the basic contention of the plaintiffs that Section 9(b)(1), 129 U.S.C.A. 1599(b) of the Act prohibits the Board from creating a unit of professional and non-professional employees without first granting the professionals a self-determination election. This particular concept is supported by the case of *Leedom* v. *Kyne,* 358 U. S. 184 (1958). That case struck down a mixed unit created by the Board since such Board action was in excess of the rights granted them by the enabling legislation and in clear contradiction of the Act. The Court further held that in such a case jurisdiction would lie in a Federal District Court of an original suit to prevent deprivation of such rights. The argument which is posited upon the authority of the *Kyne* case continues with the proposition that jurisdiction is therefore proper in the District Court. This line of argument is supported by the defendant, I.T.T.

In opposition to the order to show cause stand the N.L.R.B. and the Union. It is their basic contention that subject matter jurisdiction in the District Court is defective in the instant application and that the Board's motion to dismiss for this defect must be granted.

Generally speaking Board certification proceedings are not reviewable by District Courts but may be reviewed in

the Court of Appeals when relevant to an unfair labor practice proceeding. See *Boire* v. *Greyhound Corp.*, 376 U. S. 473 (1964) and *Saveon Drugs* v. *Cuneo*, 51 L.R.R.M. 2368 (D. C. N. J., 1964). In view of this settled body of law the Court must analyze this matter to determine whether or not the circumstances of the instant action warrant the acceptance of jurisdiction by this Forum.

The essence of the opinion in *Kyne* seems aimed at providing an available Forum wherein a litigant might raise the fundamental question of the deprivation of rights guaranteed him by law. In *Kyne* there was doubt that the plaintiff would be unable to express his argument in any recognized Forum if the District Court were precluded from taking jurisdiction of the matter.

When this concept is contrasted with the instant factual situation several points of difference may be noted. The plaintiffs herein have refused to participate in the Board proceedings where their entire position could be aired and appropriate appeal remedies available. As intervenors in an unfair labor practice hearing they would have standing as persons aggrieved under 10(f) of the Act to petition to the Circuit Court of Appeals for review should they fail on their representation issue argument. *Shoreline Enterprises of America, Inc.* v. *N.L.R.B.*, 262 F. 2d, 933 (5th Cir. 1959). This procedure would insure the plaintiffs of an adequate hearing of their complaints by a competent tribunal with power to grant the appropriate relief. In addition their remedies would include timely resort to the Circuit Court of Appeals by the method outlined above.

Examination of the transcript of the instant case and of the Board proceedings evidence the plaintiffs' reluctance to appear before the Board and to put forth the merits of

their case. Mere preference of a District Court over an agency by a litigant is not a sufficient reason to invoke a concept of jurisdiction only applicable to very limited conditions.

It is not incumbent upon this Court at this time to decide either the merits of the plaintiffs' contentions or to pass upon its motives for refusing to enter into the Board proceedings. However, where the subject matter of jurisdiction of the Court is seriously challenged it is implicit that the party claiming that jurisdiction assert the grounds thereof. In view of the dissimilarity between the instant plaintiffs and those in the *Kyne* case, this Court is of the opinion that it lacks jurisdiction of the matter at this time. By allowing a group of plaintiffs to foist jurisdiction on the Court where it is not otherwise present by claiming to be deprived of certain statutory rights, the Court would invade an area which Congress intended and which properly belongs under the control and expertise of the Board. The *Kyne* exception is a narrow one and cases claiming the benefit thereof must clearly and squarely fall within the procedural ambit delineated in that decision. Suffice to say that plaintiffs have shown no compelling reason to exercise any supposed general equity powers of this Court so as to find the requisite subject matter jurisdiction by utilization of the *Kyne* precedent.

In light of the foregoing the plaintiffs order to show cause will be denied and the defendants motion to dismiss for lack of subject matter jurisdiction accordingly granted

Let counsel for the Board submit an appropriate order with consent as to form from all parties.

APPENDIX B

Per Curiam Opinion of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15609

WILLIAM P. LAPLANT, JOHN R. ATTWOOLL, G. J. BOEHM, T. F. BUCK, JAMES M. CLARK, WILLIAM R. FRAZIER, JR., T. N. GRIFFITH, JR., RAYMOND E. HARRISON, BRUCE LAGER, CHARLES A. PANSARASA, CHARLES J. STUPPI, JR., PHILIP H. IANNENHOLZ, JOHN V. WILDING, DANIEL E. WYATT, I. L. FLETCHER, on behalf of themselves and all other persons similarly situated,

Appellants,

v.

FRANK W. MCCULLOCH, Chairman, BOYD STEWART LEEDOM, JOHN H. FANNING, GERALD A. BROWN, HOWARD JENKINS, JR., being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued March 28, 1967

Appendix B

Before: HASTIE and SEITZ, Circuit Judges; and BODY, District Judge.

OPINION OF THE COURT

(Filed July 31, 1967)

PER CURIAM:

This is a companion case to *International Telephone and Telegraph Corp.* v. *NRLB*, — F. 2d —, also decided today. In that case we mentioned the fact that certain professional employees of I. T. & T. had filed a petition with the National Labor Relations Board seeking the decertification of Local 400, International Union of Electrical, Radio and Machine Workers, AFL-CIO, as representative of their bargaining unit. However, the Board dismissed the petition because unfair labor practice charges (the subject of today's companion decision) by Local 400 against the employer were pending.

Thereupon, the unsuccessful employee petitioners filed the present suit in the district court seeking a declaratory ruling that the original certification of their mixed engineer-technician unit was illegal and void under 29 U.S.C. §159(b)(1) or, in the alternative, an order directing the Board to go forward with such a decertification hearing and election as the Board had refused to conduct on the plaintiffs' petition.

The record shows that, four days prior to the institution of this action below, the appellants' counsel was invited by the trial examiner, assigned to hear the unfair labor practice charges, to intervene in the pending administrative proceeding on behalf of the professional employees. A major issue in that proceeding was whether or not the engineer-technician unit was lawfully constituted, the very

issue that concerned the appellants and was thereafter made the basis of this suit. Counsel for the appellants refused to participate in those hearings.

In view of the fact that appellants had an available forum, the National Labor Relations Board, in which to litigate the matter of which they complained, with a right to review by this court, the Supreme Court's decision in *Leedom* v. *Kyne,* 1958, 358 U.S. 184, upon which the appellants rely, does not support the claimed jurisdiction of the district court to entertain this complaint. In these circumstances, the judicial forum could not properly be substituted for the administrative. Hence, the dismissal of the action by the district court was proper.

This decision in no way affects the right of the appellants to seek the removal of the union as their bargaining representative by filing another decertification petition under 29 U.S.C. §159(c)(1)(A)(ii) after the unfair labor practices shall be remedied.

The order of the district courts will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX C

Decision of Trial Examiner of National Labor Relations Board (Re: I.T.T. Federal Laboratories and Local 400, International Union, etc.)

TXD 177-65
Nutley, N. J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION
(ITT FEDERAL LABORATORIES)[1]

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Cases Nos. 22-CA-2015 and 22-CA-2131

ROBERT M. SCHWARZBART, ESQ., and JOHN P. COOLEEN, ESQ., for the General Counsel.

CARPENTER, BENNETT & MORRISSEY, Newark, N. J., by THOMAS L. MORRISSEY, ESQ., THOMAS E. WALSH, ESQ., and EDWARD F. RYAN, ESQ., for the Respondent.

SIDNEY REITMAN, ESQ., Newark, N. J., for the Charging Party.

[1] Respondent's name appears as amended at the hearing.

Appendix C

Before: SIDNEY SHERMAN, Trial Examiner.

TRIAL EXAMINER'S DECISION

The initial charges herein were served upon Respondent on July 19 and October 12, 1964.[2] The amended complaint issued on November 10, and the hearing was held on various dates between December 16, 1964, and January 8, 1965. The issues litigated related to alleged violations of Respondent's duty to bargain with the Union and to furnish information to it, and to alleged unlawful solicitation to strikers to return to work. After the hearing all parties filed briefs.

Upon consideration of the entire record,[3] I adopt the following findings and conclusions:

I. RESPONDENT'S BUSINESS

International Telephone & Telegraph Corporation, hereinafter called Respondent, is a corporation organized under the laws of Maryland, and it operates, through a division known as ITT Federal Laboratories, plants at Nutley and Clifton, New Jersey. At these plants, Respondent is engaged in the manufacture, sale and distribution of communications equipment electronic devices and related items, and it annually ships from its Nutley plant to out-of-Sstate points good value in excess of $50,000. The Nutley plant is the only one involved herein.

Respondent is engaged in commerce under the Act.

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[2] All events hereinafter related occurred in 1964, unless otherwise stated.

[3] For corrections of the transcript of testimony taken herein, see p. 452 of the transcript, and Appendix D, attached hereto.

Appendix C

II. The Labor Organization Involved

Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

III. The Unfair Labor Practices

The complaint, as amended, alleges that Respondent violated Section 8(a)(5) and (1) of the Act by the following conduct:

A. By refusing to funish to the Union data relating to (1) seniority of employees outside the bargaining units here involved, (2) the basis for Respondent's allocation of merit increases, (3) and certain financial data.

B. By bargaining in bad faith since July 20.

C. By withdrawing recognition from the Union as the representative of one of the three units involved herein—namely, the engineer-technicians' unit, hereafter called the "mixed" unit.

The complaint also alleges that Respondent independently violated Section 8(a)(1) of the Act by offering inducements to strikers to return to work.

The answer denies the substance of the foregoing allegation, and, in addition, pleads certain affirmative defenses.

A. Sequence of Events

On January 17, 1951, the Board found appropriate three separate units of the employees involved herein, and di-

rected elections in those units.[4] Pursuant to such elections, the Union was certified as the bargaining representative for all three units.

From 1951 to September 9, 1964, the parties had virtually continuous contractual relations, and the events hereinafter related occurred during the term of a contract effective from November 19, 1961, to September 9, 1964. This contract contained a provision that under certain circumstances nonunit personnel, including supervisors, who were transferred to unit jobs, were entitled to seniority from their date of original hire by Respondent rather than from the date of their transfer into the unit. The Union became concerned about the implications of this provision early in January 1964, and requested Respondent to furnish it with certain data relating to the seniority of current nonunit employees, generally. It is undisputed that Respondent refused for 9 months to furnish the data to the extent, and in the form, requested by the Union, but finally did so in October, after the instant charge had been filed.

In the current agreement there is also a provision for merit increases for engineers and other categories of employees in the mixed unit, and the contract confers upon the Union certain responsibilities in connection wth the admnistration of this provision. On June 3, the Union, by

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[4] Federal Telecommunications Laboratories, Inc., 92 NLRB 1395. The employer in that case was a wholly-owned subsidiary of the Respondent, which subsidiary has since been dissolved, its operations being continued as a division of Respondent at the Nutley plant, among others. There is no contention that this change in the legal identity of the employer has any bearing on Respondent's obligation to honor the Board's certification of the Union in 1951.

letter, asked Respondent for certain information which it considered necessary to aid it in discharging its foregoing responsibilities. On June 5, Respondent replied that no provision of the contract required disclosure of such information and none has been furnished.

Bargaining for a new contract began with a meeting on July 20, and negotiations were still in progress at the time of the instant hearing.[5] In the negotiations, Respondent proposed various reductions in fringe benefits, pleading, *inter alia*, that they were excessive in comparison with those granted by its competitors, and were adversely affecting its competitive position. The Union on several occasions requested that Respondent substantiate its foregoing position by furnishing detailed financial data and information on a number of other items, including contracts allegedly lost by Respondent and the cost of existing fringe benefits in relation to other costs. On August 21, Respondent suggested that the Union reduce such request to writing. This was done in a letter of October 13. On December 10 Respondent refused, in effect, to furnish the bulk of the data requested by the Union.

Meanwhile, on September 9, upon the expiration of the existing contract, the Union had called a strike at Respondent's plant, and most of the employees had ceased to work. However, contract negotiations with respect to all three units at the Nutley plant continued until October 8, when Respondent announced that it was withdrawing recognition

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[5] Two sister locals of the Union (Local 447 and Local 1703), which represented two units of employees of Respondent's Federal Laboratories Division at a plant in Clifton, New Jersey, bargained jointly with the Union for provisions of common concern to all three locals.

of the Union for the professional employees in the "mixed" unit and was filing petitions with the Board for elections in such unit.[6] This announcement was made the day after a petition had been filed with the Board to decertify the Union as the representative of the engineers in such mixed unit,[7] and was allegedly prompted by such petition. On December 9, all three petitions were dismissed by the Regional Director, because of the pendency of the instant charges.

On January 8, 1965, when the instant hearing was concluded, the strike was still in effect and no contract had yet been negotiated.

B. Discussion

1. The Seniority Data Issue

This issue arose early in 1964, long before the commencement of contract negotiations, and was unrelated to such negotiations. The existing contract provided that, under certain circumstances, not here relevant, persons transferred to the bargaining units from positions outside such units would be credited with seniority for time spent in such positions and thus would be entitled to "bump" employees already in the units and had less total seniority. In 1963, the Respondent laid off 600 to 700 unit employees, and late in December 1963, a supervisor, Cammarata, accepted a nonsupervisory position in the production and maintenance unit, thereby "bumping" a unit employee. This appears to have been the first instance of such a transfer under the foregoing contract provision. A few weeks later, in re-

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[6] Cases Nos. 22-RM-191, and 22-RM-192.

[7] Case No. 22-RD-175.

sponse to an inquiry by Laird, the president of the Union, concerning the possibility of other similar transfers into the units, Atkinson, Respondent's labor relations supervisor, stated only that the matter was under consideration, whereupon Laird asked Atkinson for a list of all individuals eligible for transfer into the unit and for information as to Cammarata's seniority. Atkinson declined to furnish any data (other than that relating to Cammarata), contending that the Union was not entitled thereto. A letter dated January 22, from Laird, requesting specific data as to "management employees" in order to enable the Union to "administer its contract" was not answered. Early in February, when Laird asked whether Respondent would reply to his letter, Atkinson rejoined that the only seniority information that the Union would receive with respect to any individuals involved in a transfer would be that contained in a semimonthly bulletin issued by Respondent announcing personnel actions already taken.[8]

Laird testified further that when, shortly thereafter,[9] he solicited a reply to his letter from Carey, Respondent's manager of industrial relations, he asserted that no information would be forthcoming other than that contained in the semimonthly bulletin. However, according to Minogue, Respondent's director of industrial relations, Carey, on this occasion proposed that, in the future, whenever it decided to transfer anyone into the bargaining units, Respondent would, before effecting such transfer, furnish the Union

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[8] The Union received the information it sought as to Cammarata in such a bulletin issued late in February, about 2 months *after* his transfer had been effected.

[9] Laird variously placed this incident in late February or mid-March.

with the pertinent seniority data as to such individuals. Laird denied that Carey made any such proposal. Carey, himself, was not called as a witness. On the basis of demeanor, and, in view of Respondent's failure to call Carey to corroborate Minogue, I credit Laird and find that Carey did not make even the limited offer of advance disclosure ascribed to him by Minogue.

It is undisputed however, that the Union's blanket request of January 22, 1964, was finally honored on October 13 and 22 when the information sought was supplied.[10]

The General Counsel contends that the Respondent's refusal for about 9 months to furnish the seniority data requested by the Union violated Section 8(a)(5) and (1) of the Act. While conceding in its brief that the Union "was entitled to certain seniority information prior to an individual's return," Respondent denies that it was required to make the blanket disclosure sought.[11] The brief elaborates on this point as follows:

> It is Respondent's position . . . that the information as requested was unnecessary and of no value to Local 400, that it only took on some importance when an individual was about to return, and that this was the only time seniority information could be effectively used to advise bargaining unit employees.

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[10] This disclosure was made after the initial charge here was filed and pursuant to a tentative settlement agreement, which was not, however, consummated. Such eventual compliance with the Union's request does not make the issue moot. *The Electric Furnace Co.*, 137 NLRB 1077.

[11] Respondent's brief, p. 21.

Appendix C

Respondent contends further, relying on Minogue's aforecited testimony, that Carey offered to furnish the Union with the requested data as to any individual whose transfer to the unit was contemplated, and before such transfer was effected. However, for reasons stated above, I have refused to credit Minogue, and have instead credited Laird's testimony that the only data offered by Carey or Atkinson was that continued in the semimonthly, personal bulletin, which reported transfers only after they had been effected.

Thus, it appears that Respondent concedes that the Union was entitled to a limited advance disclosure of the seniority data in issue, and I find that for a period of 9 months Respondent, contrary to its contention, did not make, or offer to make, even such limited disclosure.

The question remains whether as the General Counsel contends, the Union was entitled to the more comprehensive advance disclosure sought by it. The Union's position was that it needed the seniority data as to nonunit employees so that it could compile a more realistic seniority list, and advise individual members of the bargaining unit to what extent their seniority rights would be adversely affected if all persons outside the unit who were eligible for transfer into the unit were so transferred. According to Laird's uncontradicted testimony, the extensive layoffs effected in 1963, coupled with the transfer of Cammarata into the unit, late in December 1963, with the resultant bumping of a member of the unit, created concern among the employees, who were besieging the Union with questions about the possible effect of any like transfers in the future on their job status.

Appendix C

The foregoing contention raises a question which does not appear to have been heretofore considered by the Board. It is now well settled that a union is entitled to information that is necessary and relevant, to the discharge, not only of its bargaining function, but also of its function of administering a contract. While the complaint alleges, and Laird's January 22 letter explains, that the Union needed the data to "administer" the contract, it is clear from the context of the complaint and the letter, and from Laird's testimony that "administer" was there used, not in the usual sense of detecting, and protesting, infractions of the contract, but rather in the narrower sense of maintaining more realistic, seniority rosters for the benefit of the unit employees. Moreover, had the Union desired the data for grievance purposes, there appears to be no reason why the Union could not wait until, as a result of a transfer, a unit employee suffered some adverse effect which could be the subject of a grievance. And, at that time the Union would have been entitled only to the data relevant to such grievance and not to the blanket disclosure here sought.

As for the relevance of the data sought to contract negotiations, there is a suggestion in Laird's testimony that the data would have enabled him to determine whether to seek in contract negotiations a modification of the existing contract provisions permitting transfers into the unit with accrued seniority.[12] However, Laird did not assert that he had this purpose in mind when he made his various oral

[12] In fact, a clause limiting such transfers was proposed by the Union on July 28, in negotiations for a new contract.

and written demands for the seniority data;[13] and the instant case was, moreover, litigated solely on the theory that the Respondent's refusal to furnish the data violated Section 8(a)(5) and (1) of the Act because the data was needed by the Union to enable it to "administer" the contract by maintaining proper seniority rosters.[14] Under all the circumstances, I find that the issue of the effect of Respondent's nondisclosure of the seniority data on the Union's contract-negotiation function was not adequately litigated.

There is, thus, insufficient basis for finding that the data was sought or needed to aid the Union's discharge of its grievance-prosecution or contract-negotiation function, and it has been established only that the Union's request was prompted by a desire to advise the unit employees of the potential impact of the Respondent's new transfer policy on their seniority and job tenure. So far as I am aware, the Board has not yet had occasion to pass on the duty of disclosure under such circumstances. However, the foregoing "advisory" purpose of the Union would seem to be as much an integral part of its statutory role as the prose-

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[13] Laird's reference to the possible usefulness of the data in connection with contract negotiations was made in response to a question as to what functions such data might serve (apart from that of up-dating the seniority rosters), and not as a statement of Laird's reason for seeking the data. (As to the circumstances under which this question was asked, see next footnote).

[14] Neither the complaint nor the briefs of the General Counsel and the Union allude to any other reason for requesting the data. Laird's reference to the possible usefulness of the data in connection with contract negotiations (see preceding footnote) was made only when, both parties having rested, he was recalled as a witness for the Trial Examiner over Respondent's objection.

cution of grievances or negotiations of contracts. Section 8(a)(1) of the Act protects the right of employees to engage in concerted activities, not only for the purpose of collective bargaining, but also for "other mutual aid or protection." It follows that, subject to exceptions not here relevant, any activities of a union which serve this purpose of "other mutual aid or protection" are protected by Section 8(a)(1), and the furnishing by a union to employees of advice as to matters which bore some reasonable relation to their job security would seem to be such an activity.[15] The question remains what was the legal effect of Respondent's refusal to furnish such information. When an employer refuses to furnish data necessary to enable a union to discharge its bargaining function, and thereby impedes the union in the prosecution of the collective-bargaining activities protected by both Section 8(a)(5) and Section 8(a)(1) of the Act, he is held to violate those provisions. By analogy, it seems proper to hold that where an employer refuses to furnish data desired by a union in order to enable it to discharge some other function which falls within the ambit of Section 8(a)(1) of the Act, and thereby frustrates the Union's discharge of that function, he violates that provision of the Act. Respondent, itself, does not seriously dispute this, since, as already noted, it concedes that it owed the Union some duty of advance disclosure. The only difference between it and the General Counsel here is as to the exact timing and scope of the disclosure; the Respondent contending that the Union was entitled to advance disclosure only when a particular transfer into the units was imminent and only with respect to the individual about to be so transferred,

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[15] Cf. *Boeing Airplane Co.*, 110 NLRB 147, set aside 238 F. 2d 188 (C. A. 9).

and the Union contending that it was entitled to disclosure, upon request, of seniority data as to all individuals eligible for transfer into the units. When asked what use each such disclosure would be to a unit employee unless a transfer affecting his seniority was imminent, Laird answered that such an employee would be in a better position to decide whether to accept an offer of other employment, if he knew just how firm his seniority ranking with Respondent was. Thus, a unit employee who would not otherwise consider such an offer might welcome it if he knew that there were enough nonunit employees with higher seniority eligible for transfer to jeopardize his tenure. It cannot be said that the "early warning" system which the Union thus sought to establish was not reasonably related to the "mutual aid or protection" of the employees.

Moreover, even if one accepts Respondent's position that there was no duty of disclosure until a transfer was impending, and then only with respect to the individual about to be transferred, it would still be necessary to find a violation, as it has been found that Respondent did not make even such limited disclosure.

For all these reasons, I find that Respondent's refusal for a period of 9 months to disclose the seniority data requestion by the Union violated Section 8(a)(1) (although not Section (8a)(5) of the Act.

2. The Nondisclosure of Merit Review Data

The current agreement contained a provision for periodic merit review for engineers, chemists and spectroscopists, and contemplates recommendations by the Union with regard to the distribution of one-third of any moneys allocated by Respondent for merit increases to employees in

the foregoing classifications. The complaint alleges that Respondent violated its bargaining obligation by refusing to furnish the Union with certain data requested by it to enable it to formulate appropriate recommendations for merit raises. However, the job classifications here involved fall within the mixed unit, and the question whether the refusal to furnish data sought constituted a breach of the duty owed by Respondent to the Union as the statutory representative of the employees in the mixed unit cannot be resolved without first disposing of the Respondent's contention that such unit was inappropriate. Accordingly, the nondisclosure issue with respect to merit reviews for the mixed unit will be deferred, and treated below as part of the larger issue of the Union's legal status as the representative of the mixed unit.

3. The Solicitation of Strikers

Two of Respondent's engineers, who joined the strike called by the Union on September 9, testified without contradiction, and I find, that late in September Respondent's Laboratory Director, Dr. Panter, solicited them to abandon the strike and return to work. According to one witness (Goldshine), after pointing out that a number of engineers had already abandoned the strike, Panter told him that Respondent "would remember its loyal employees at merit review time." According to the other engineer (Patterson), Panter on September 18, in urging him to return to work, appealed to his loyalty to Respondent, and on September 23, promised the witness that if he was among the first employees to return to work he could "expect a raise and a promotion," but that if he returned "after the fifty per cent point, it won't count anymore," adding, "we will remember those who were loyal to us during the strike and those who were not."

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Respondent does not dispute the veracity of the foregoing testimony, which I credit. At the hearing Respondent contended only that Panter was not a supervisor, and that Respondent was therefore not responsible for his conduct. In its brief, Respondent appears to have abandoned even this contention, referring to Panter as a "supervisor," and arguing only that the incident was "an isolated case and not part of any pattern of conduct."

In any event, it is clear from the record, and I find, that Panter was a supervisor. He directed the work of 30 or 40 employees, including about 25 engineers, and was assisted in that task by a "deputy" and 6 "group leaders." It is undisputed, moreover, that Panter participated in meetings with the Union concerning grievances over the failure of engineers to receive merit increases, and acted for Respondent in resolving such grievances.

While the Board has held that mere appeals to strikers to return to work are not *per se* unlawful,[16] we are not dealing here with such appeals as were involved in those cases, but with solicitation which was reinforced by threats of reprisals and promises of benefits.

As to the "isolated" nature of the Panter incidents, it is true that his solicitation of the two engineers was the only such action shown to have occurred in a strike which involved 1,100 employees at the plant here involved, as well as 1,700, more at another plant[17] (who also struck on September 9), and that strike up to the time of the instant hearing had been in effect for more than 3 months. It is

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[16] *The Texas Company* 93 NLRB 1358, 1361; *Celanese Corporation of America*, 95 NLRB 664.

[17] The one at Clifton. See Fn. 5, above.

also true, that the Board has held that even coercive utterances, such as are here involved, while unlawful, do not warrant a remedial order, where they were addressed to relatively few employees and the respondent engaged in no other unfair labor practices.[18] However, in view of the other violations found herein, such cases are clearly not apposite.[19]

Accordingly, I find that, by Panter's threats and promises, to induce employees to abandon the strike, Respondent violated Section 8(a)(1) of the Act.

4. The Withdrawal of Recognition With Respect to the "Mixed" Unit

As already related, in January 1951, the Board in a representation proceeding determined, *inter alia*, that the mixed unit was appropriate and, on the basis of the ensuing election, certified the Union as the representative of such unit. In that proceeding the Respondent had contended that the mixed unit was not appropriate because it would include certain classification designed "technicians A, B, and C, in a unit which otherwise consisted of professional employees—engineers and chemists. In so contending, Respondent relied on Section 9(b)(1) of the 1948 amendments to the Act, which provision precludes the Board from finding appropriate for the purposes of collective bargaining

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[18] *Middletown Mfg. Co.*, 141 NLRB 234; *Twin-Kee Mfg. Co.*, 130 NLRB 614.

[19] As the strike activity of the engineers was protected, concerted action, regardless of the legal status of the Union as their representative, any determination of such status adverse to the Union cannot affect the result here reached as to the unlawfulness of Panter's solicitation.

a unit which "includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." At that time, however, it was the Board's policy notwithstanding the foregoing provision, to find appropriate a unit consisting of both professional and nonprofessional employees, without affording the professional employees an opportunity to vote on the issue of separate representation, provided that such unit was composed predominantly of professional employees.[20] In view of this policy, the Board held in the foregoing representation case as follows:

> "Under the circumstances, we need not decide whether technicians are professional employees within the meaning of the statutory definition. As all the parties are agreed that the engineers and chemists are professional employees, and the record clearly shows that . . . the bargaining unit as proposed by the petitioners . . . is composed predominantly of professional employees within the meaning of Section 2(12), we find in accordance with established precedent that the technicians may appropriately be included" in the unit sought.

After the certification of the Union for the mixed unit, as well as the other two units here involved, the Respondent, as already related, recognized the Union as the representative of such units and entered into a series of contracts extended from 1951 to September 9, 1964. Even after the expiration of the last such contract on September 9,

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[20] *Boeing Airplane Co.*, 86 NLRB 368; *Westinghouse Electric Corporation*, 89 NLRB 8.

1964, Respondent continued to recognize the Union for all three units, until October 8, when, citing the fact that a petition had been filed the day before to decertify the Union as the representative of the professional employees in the mixed unit, and asserting that it entertained doubt as to the continuing majority status of the Union in such unit, Respondent withdrew recognition of the Union as the representative of the professional employees, offering, however, to continue to recognize the Union as the representative of the balance of the unit.[21]

The General Counsel contends that by such withdrawal of recognition Respondent violated Section 8(a)(5) and (1) of the Act. Respondent rejoins that the 1951 finding of the Board with respect to the appropriatenate of the mixed unit was invalid because of the Board's failure to afford the professional employees a separate election as required by Section 9(b)(1) of the Act, and that the ensuing certification of the Union for such unit was not legally binding for that reason alone.

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[21] Respondent also pleaded in its answer, as an affirmative defense, that because of the decertification election, and the abandonment of the strike prior to October 8 by a substantial number of engineers, it entertained a good-faith doubt on that date that the Union still represented a majority of the employees in the mixed unit. However, as Respondent offered no testimony that it in fact entertained any such doubt, this defense was stricken at the hearing on motion of the General Counsel, which was not opposed by Respondent. In any case, since Respondent conceded at the hearing that on October 8 a clear majority of the employees in the mixed unit were still on strike on October 8, I would find no merit in this defense. It is not credible that Respondent could in good faith assume that any persons abandoning the strike were defectors from the Union, without at the same time assuming that those remaining on strike were union adherents.

Appendix C

Respondent's main reliance here is on *Leedom* v. *Kyne*,[22] where the Supreme Court affirmed a district court finding that the Board had exceeded its statutory powers in finding appropriate a unit of professional and nonprofessional employees, without consulting the wishes of the professional employees as required by Section 9(b)(1) and, even though, as in the instant case, the professional employees predominated numerically.[23]

While it is well-settled that only under exceptional circumstances may a respondent relitigate in an unfair labor practice case a Board unit finding made in a representation case, such exceptional circumstances appear to be present here. Clearly, the Board's 1951 unit finding, insofar as it joined professionals with nonprofessionals, was invalid when made, as tested by the rule later announced in the *Kyne* case. What effect should be given to that ruling here necessarily raises questions which were not considered by the Board in the 1951 representation case and which Respondent would seem to be entitled to raise at this time,[24] unless, as contended by the General Counsel, this right has been waived or otherwise forfeited by Respondent.

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[22] 358 U. S. 184 (1958).

[23] In the Supreme Court, the Board, contrary to its position in the district court, did not dispute that it had exceeded its statutory power, and defended only on the ground that the matter was not properly before the courts. The Court rejected this defense.

[24] See *American Broadcasting Co.*, 134 NLRB 1458, where the Board, in a refusal to bargain case determined that the Union's certification was invalid because of a supervening Supreme Court ruling in a different case, and dismissed the complaint for that reason. The Board majority there stated. ". . . we believe that public confidence in the administrative process requires a tribunal to admit its errors and not push a matter to an erroneous conclusion under the guise of procedural regularity."

Appendix C

We turn now to the foregoing "waiver" contention of the General Counsel. He points to the fact that Respondent had for 13 years acquiesced in the Board's mixed unit finding, and that such acquiescence continued even for 6 years after the 1958 ruling of the Supreme Court in *Leedom* v. *Kyne*, and the General Counsel asks, "... after how many years of bargaining in such a unit could Respondent validly raise the argument of *Kyne* v. *Leedom* ...?"

No authority on this point has been cited by the parties, and the issue seems to be one of first impression. If one looks at the statute alone, it appears that, while Section 9(d) contemplates the relitigation in unfair labor practices cases of the validity of Board action in representation proceedings, the Act nowhere prescribes any period of limitations within which such Board action may be challenged by a respondent. However, the General Counsel's argument seems to imply that the Board should for policy reasons impose some period of limitations upon the relitigation of representation case issues in unfair labor practice cases, no matter how meritorious the grounds for such relitigation.

It may seriously be doubted that the Board may lawfully take such action on policy grounds absent any specific authority therefor in the Act.[25] First bargain with a union and later question the validity of its certification. Indeed, if the apparent absence of any decision dealing with such a situation is any criterion, the instant case may well be

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[25] See *Leedom* v. *Kyne*, *supra*; *Colgate-Palmolive Peet Co.* v. *N.L.R.B.*, 338 U. S. 355. In the latter case, the court said:

> To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.

the first of its kind in the 30 years of the Board's history. I am not convinced therefore, that there are compelling policy reasons for adopting any rule of limitations in the area under consideration. As for the General Counsel's reliance on some legal rule of waiver or estoppel, those doctrines may ordinarily be invoked only on behalf of a party who has changed his position to his detriment in reliance upon some conduct of the adverse party. Here, it has not been shown that the Unions lost anything by Respondent's acquiescence in the Board's unit finding or by the negotiation of contracts on the basis of such finding.

In sum, I find no merit in the contention that Respondent's attack on the mixed unit comes too late.

In a somewhat different but related vein, the General Counsel contends that, even if Respondent is not estopped to attack the Board's unit finding by its prolonged acceptance thereof, the incorporation by Respondent in the various contracts negotiated with the Union of the unit found appropriate by the Board, together with substantial modification thereof, effected by the parties, renders inapplicable the provisions of Section 9(b)(1), as construed in the *Kyne* case. Here, the General Counsel relies on the case of *Vincent Drugs*,[26] where the issue was whether a union had violated Section 8(b)(2) of the Act by seeking to enforce a union-shop contract covering a mixed unit. The General Counsel there contended that the union-shop clause was invalid under Section 9(b)(1) of the Act because the unit was rendered inappropriate by the intermingling of professional with nonprofessionals, without affording the professionals an opportunity to vote for a separate unit. In fact, there had been no election at all in that case, as the unit

[26] 144 NLRB 1247.

was one voluntarily established by the parties. After a review of the legislative history of Section 9(b)(1), and Board and court decisions (which antedated *Leedom* v. *Kyne*), the Board concluded that 9(b)(1) was not applicable because there had been no prior resort in that case to a Board representation proceeding and the unit was purely consensual. The *Kyne* case was distinguished as follows:

> . . . the *Kyne* case was not concerned with the validity of an existing contract covering a unit of both professional and nonprofessionals that had been established by the parties, based on an established collective bargaining history that preceded the making of the contract. The precise issue in the *Kyne* case was whether such a combined unit could be established initially by Board action in a representation proceeding without first affording the professional employees a self-determination election to authorize their inclusion in such a unit. We therefore find the cited case distinguishable and inapposite.

Thus, *Vincent Drugs* would seem to hold that Section 9(b)(1) applies only where the mixed unit is the creature of the Board, and not where it is the creature of the parties. Recognizing this, the General Counsel contends that the instant, mixed unit, although initially created by the Board was transformed into a creature of the parties by the long history of bargaining with respect to such unit and the extensive alterations of the unit by the parties, and that Section 9(b)(1) is therefore inapplicable under *Vincent Drugs*. However, it is not clear how such negotiations and changes in the unit can cure the basic legal defect in the Board's unit finding—namely the joinder of professionals and non-

professionals without a self-determinative election for the professionals. It is not contended that the changes in the unit resulted in the elimination of all professionals or all nonprofessionals. Counsel concedes in his brief that the unit is presently mixed. An attempt to analogize the instant case to *Vincent Drugs* might be more appropriate if the Respondent were relying solely on the voluntary accretions to the unit as the basis for its attack thereon. The fact is, however, that the Respondent's attack on the unit is directed, not at the addition thereto by the parties of any particular category, but rather at the *principle* of joinder of professionals with nonprofessionals, which was sanctioned by the Board in the representation case, over Respondent's objection. As it is thus clear that Respondent is challenging only the foregoing nonconsensual aspect of the unit, and not the consensual ingredients thereof, I deem *Vincent Drugs* inapposite.

Finally, the General Counsel contends that the Board did not expressly find in the 1951 representation case that the "technicians" there involved were not professional employees, deeming it unnecessary to decide that question, since under the Board's then policy it would not have affected the result.

While it is true that the Board made no affirmative finding in the 1951 representation case as to the professional status of the "technicians" included by the Board in the mixed unit, it would seem to be implicit in the language of Section 9(b)(1), as construed in the *Kyne* case, that such a finding is mandatory where the issue is appropriately raised, as it was here, else there would be no basis for determining whether the limitations of Section 9(b)(1) were

applicable.[27] It follows that the Board's omission to make such a finding was, in itself, error and that the 1951 unit determination is invalid for that reason alone, if for no other reason.

In conclusion on this point, I find that the Board's 1951 determination as to the appropriateness of the mixed unit was invalid under the *Kyne* case, that such defect was not cured by Respondent's subsequent conduct, and that Respondent was therefore not obligated, at any time here material, to bargain with the Union with respect to such unit.[28] I will therefore recommend dismissal of the allegation of the complaint that Respondent violated Section 8 (a)(5) and (1) of the Act by ceasing to recognize the Union on October 8 as the representative of the mixed unit, as well as the relegated allegation that Respondent violated its bargaining duty by refusing to furnish the Union certain merit review data pertaining to the mixed unit.

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[27] Moreover, I am satisfied from evidence adduced before me that the "technicians" in the mixed unit did not satisfy, at any time here material, the statutory definition of professional employees. (The General Counsel appears to contend that such evidence shows only that the unit is now mixed, but not that it was mixed from its inception. However, the evidence adduced before me related to technicians A, B, and C, who were included in the unit as initially established by the Board.)

[28] As already noted, on October 8, Respondent offered to continue to recognize the Union as the representative of the nonprofessionals in the mixed unit. However, the Union did not accept the offer nor did it propose bargaining on any basis other than the certified units.

Appendix C

5. The Issue of Bad-Faith Bargaining

a. Appropriate Unit

The complaint, as amended, alleges that since July 20, Respondent negotiated with the Union in bad faith concerning the terms and conditions of employment of the employees in the three units here involved. As it has been found that one of these units—the mixed unit—was inappropriate, and Respondent was therefore under no statutory duty to deal with the Union as the representative of such unit, it will be recommended that the complaint be dismissed insofar as it alleges a failure to bargain in good faith with the Union as the representative of such unit.

As to the other two units—referred to in the record as the "shop-maintenance" and "clerical-drafting" units—it was agreed at the hearing, and I find, that they are appropriate for the purposes of collective bargaining.[29]

b. Majority Status

It was agreed at the hearing, and I find, that, at all times here material, the Union represented a majority of the employees in each of the foregoing two units.

c. The Negotiations

The negotiations under consideration were for contracts to replace those which were due to expire on September 9. The history of these negotiations begins with a meeting in the fall of 1963 between representatives of Respondent and the Union to discuss problems relating to the implementation of certain clauses in the 1961 contract—the so-

[29] As to the composition of such units, see Appendices B and C, attached hereto.

called "transfer" clause[30] and the "two-cent" fund provision.[31] At this meeting, Respondent's director of industrial relations, Minogue, stated that, if those problems could be satisfactorily resolved, Respondent would be amenable to "early negotiations" for a new contract. On December 31, 1963, Laird, the Union's president, informed Minogue that agreement had been reached between the Union and Local 1703 regarding the transfer clause,[32] and inquired whether, in view of this, the Respondent would engage in "early" negotiations. Minogue promised to give the matter consideration. At a meeting in April, Respondent's representatives volunteered that there would be no early negotiations unless the Union's parent withdrew a law suit recently filed by it to compel Respondent to establish the "two-cent" fund. When the Union responded that it had no control over the law suit, and urged that the parties "sit down" and negotiate, Respondent adhered to its position that there could be no negotiations until the suit was withdrawn. Late in May 1964, the Union's renewed plea for early negotiations was again rejected because of the pendency of the fund litigation. On June 11, Laird gave for-

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[30] This clause related to procedures to be followed by Respondent in transferring employees from the instant plant to the bargaining units in the Clifton plant of Respondent, represented by IUE Local 447 and 1703.

[31] This clause provided for the establishment of a fund in an amount to be computed by multiplying by two cents the number of man-hours worked in a designated week in the Nutley and Clifton plants, which fund was to be used to correct wage inequities in both plants.

[32] The transfer clause and the two-cents clause apparently contemplated agreement by Local 1703 and Local 447, as well as the Union, on the manner of their implementation.

mal written notice to Minogue of the Union's desire to terminate the existing agreements and asked Minogue to communicate with Laird to arrange a meeting date. When on June 23, Laird broached the matter of early negotiations, to McNeil, Respondent's vice president for industrial relations, he replied, in effect, that he did not believe in beginning negotiations earlier than was required by the contracts—namely, 30 days before the September 9 contract expiration date.[33] The next day, when Laird pointed out to Minogue that, if pursuant to McNeil's edcit, negotiations did not begin until August 10, and 2 weeks were lost thereafter because of vacations,[34] only 17 days would remain for actual negotiations before the contracts expired. In response, Minogue merely indicated that he would not overrule his superior, McNeil, and when, on June 25, Minogue finally acknowledged Laird's aforementioned letter of June 11, he stated, with regard to a meeting date, only that meetings would be held in accordance with "Article XXIV of the current . . . agreements," which contained the 30-day provision alluded to by McNeil. On July 13, Laird again

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[33] See Article XXIV of the 1959 contracts, as amended by the 1961 "Strike Settlement Agreement."

[34] In 1964, Respondent initiated a policy of suspending negotiations for 2 weeks in August to permit all the members of the negotiating committee to take their vacations at the same time. The former practice had been one of staggered vacations throughout the negotiations, which deprived the committee of the services of particular individuals at a time when their advice was needed. Laird did not dispute the wisdom of the new policy, but in a letter of June 3, proposed that Respondent compensate for the resulting loss of 2 weeks' negotiating time in August by starting to bargain 2 weeks earlier. For further discussion of this point, see footnote 38, below.

wrote Minogue, proposing deferral of vacations in order to enlarge the time available for negotiations.[35]

A few days later, Respondent announced that negotiations would begin on July 20, and the first bargaining session was held on that date.

Before discussing the actual negotiations, it may not be amiss to refer to two incidents, which the General Counsel contends afford an insight into the Respondent's approach to the 1964 negotiations. Both of the incidents involved an exchange between Carey, Respondent's labor relations manager, and La Gana, one of the Union's chief stewards. The first such incident occurred in March 1964, when, in the course of a rather heated dispute over certain grievances Carey taxed La Gana with being unreasonable and declared that management could no longer "live with" some of the clauses in the current contract and was "preparing a set of proposals of such a nature that it would take a 14-week strike to condition" the Union to accept them, adding that, if La Gana served on the negotiating committee, "it would take a 28-week strike." On June 9, when in the course of another dispute over the same matter, Carey indicated that Respondent would seek a change in the relevant contract provision, La Gana asked, "you mean you are sending out proposals like you told us and you are going to put us out in the street for 14 weeks?" When Carey answered in the affirmative, La Gana announced that he had been elected to the Union's negotiating committee, which he took to portend a 28-week strike, in view of Carey's prior prognostication. To this, Carey retorted that, when the strike was over, La Gana might not even have a job.

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[35] This proposal was rejected by Respondent on July 27.

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Returning to the bargaining, at most of the sessions the Union bargained jointly with its two sister locals for provisions common to all 5 units represented by the three locals. In the other sessions, the Union bargained separately for provisions peculiar to the Nutley plant. At the first meeting, on July 20, the three unions submitted their joint contract proposals, which included demands for improvements in fringe benefits. In discussing these demands, Respondent referred to the adverse effect on its competitive position of the cost of existing fringe benefits, and announced its determination to reduce such costs. In this connection, Respondent asserted that it was "in a fight for survival," and that Respondent was losing many contracts because of the "cost factors." And in the counterproposals submitted by Respondent on July 31, it not only ruled out any improvement in existing fringe benefits but even proposed downward revision of such benefits. At the next meeting, on August 21, in rejecting a demand for an increase in group insurance coverage, Respondent reiterated its position that the negotiations would have to result in reduction of Respondent's costs to enable it to become competitive. Between August 21 and October 13, Laird made various requests for data bearing on Respondent's contention that the excessive cost of existing fringe benefits was impairing its competitive positions. These requests, and Respondent's reply thereto, will be considered in more detail below.

Although there were several meetings later in August and early in September, there were no significant developments until the meeting of September 8. On that date, Respondent submitted revised proposals, which represented some softening of its original written demands for reduction in fringe benefits, together with a new pension pro-

posal. Laird testified and, I find, that these proposals were submitted as a package, which the Union was required to accept, or reject, *in toto*.[36] The pension proposal, moreover, called for a drastic reduction in existing benefits. By way of illustration, Laird stated that in his case his monthly pension in case of retirement after 20 years of service, would be reduced from $140 to about $55. The unions rejected all the foregoing proposals. At another meeting on September 9, Respondent withdrew or further modified some of the demands it had scaled down on September 8, On September 9, at midnight, both plants involved in the negotiations were struck. Bargaining continued thereafter with respect to all three units at the Nutley plant, until October 8, when Respondent announced its decision not to bargain further with the Union for the mixed unit. On October 10, the Union submitted revised proposals, and Respondent rejected all except some which related merely to retention of past practices and clarification of existing contract language.

At the time of the instant hearing, the strike was still in effect, and no agreement on a contract had as yet been reached.

Evaluation of the Negotiations

(1) The Time Factor

It is clear from the foregoing that Respondent resisted pressure by the Union that negotiations begin uncondition-

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[36] Respondent points to certain matters in the record, which it contends reflect on the credibility of Laird's testimony that the September 8 proposals were presented as an indivisible package. However, I deem more significant than the matters cited by Respondent, the fact that Carey, Respondent's labor relations manager, to whom Laird attributed the statement that the offer was a "package," did not take the stand to dispute Laird's testimony.

ally at a date earlier than that normally adopted by the parties in their past bargaining,[37] and that Respondent conditioned any such acceleration of negotiations on settlement of the dispute over the transfer clause and on the withdrawal of the IUE's suit over the two-cent fund.

It is well settled that a respondent may not condition compliance with a proper request for bargaining upon the happening of some extransous event. However, it may be noted that here, unlike the usual case of a conditional refusal to bargain, Respondent did not say that it would not bargain at all until the stipulated condition was met, but merely refused conditionally to advance the normal date for bargaining. Moreover, although in their contract the parties had stipulated that bargaining would begin "as soon as practicable" after receipt of new contract proposals (but not less than 30 days before the contract expiration date), the Union did not in fact submit any contract proposals until the first bargaining meeting, on July 20. Had the Union wished to force the issue of early negotiations, it needed only to submit its proposals and invoke the foregoing contract provision.

Finally, and perhaps most significant of all, we are not dealing here with a situation where the parties are bargaining for a first contract. On the contrary, the record shows that the parties had on six occasions in the past successfully negotiated contracts, and had done so without resorting to

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[37] Respondent made an offer of proof that in the past negotiations for renewal of contracts expiring in the month of September had begun in July or August. While I ruled such evidence as to the exact dates involved to be irrelevant, it is inferable from the record that the Union's purpose in proposing "early" negotiations was to begin them on a date earlier than that established by past practice.

"early" negotiations. Under these circumstances, Respondent's refusal to start negotiations on a date in the spring of 1964, as proposed by the Union, would not, in itself, seem to reflect on its good faith.[38]

(2) CAREY'S STRIKE THREAT

I find merit, however, in General Counsel's contention that Respondent's basis approach to the 1964 negotiations and its bad faith are demonstrated by Carey's warnings to La Gana early in 1964, cited above, that Respondent was preparing contract proposals which were so stringent that the Union would not accept them without a prolonged strike. The fact that Carey was provoked to utter these warnings by La Gana's obduracy in grievance sessions does not necessarily prove that they did not accurately reflect management's intentions. Moreover, I am compelled to infer from Carey's failure to take the stand that, had he been called as a witness, his testimony would not have been favorable to Respondent on this issue. Finally, I am struck by the fact that Carey's prognostications as to the course that the negotiations would take proved singularly accurate. Thus, Union proposals for improvements in existing fringe benefits were met by Respondent with insistence that there be substantial *reductions* in such benefits. While Respondent softened its position somewhat on

[38] The General Counsel contends that Respondent impeded the 1964 negotiations unduly, when as noted above, it instituted a practice of suspending negotiations entirely for 2 weeks in August, and refused to compensate therefor, as suggested by the Union, by commencing them 2 weeks earlier than usual. However, it may be that Respondent's decision to start negotiations on July 20 rather than on August 10, as had been originally contemplated by McNeil, was in deference to the foregoing request.

September 8 and 9, the effect of this was more than offset by two circumstances: (1) Respondent's insistence that the Union could not accept some of its proposals and reject others, but must treat all of them as a package, and (2) the Respondent's injection into the negotiations on September 8 of its proposal for a reduction in existing pension benefits *by more than 50 percent.* The net result was that, despite Respondent's apparent conciliatory movement in certain areas on September 8 and 9, the parties were further apart than ever; and the ensuing strike had at the time of the close of the instant hearing continued for 4 months. The conclusion is inescapable, therefore, that Carey, in his exchanges with La Gana, inadvertantly let the "cat out of the bag," and gave La Gana an accurate blueprint of Respondent's bargaining strategy, which was to take positions calculated to avoid agreement, and to provoke a prolonged strike that would so weaken the Union that it would be forced to capitulate. And, so far as appears from the present record, Respondent adhered to that blueprint throughout the negotiations.

It is well settled that it is incompatible with the statutory requirement of good faith bargaining to negotiate, as here, with a fixed determination to avoid, rather than reach, agreement. Accordingly, I find that Respondent from July 20 to November 10,[39] bargained with the Union in bad faith with respect to contracts for the shop-maintenance and clerical-drafting units, thereby violating Section 8(a)(5) and (1) of the Act.

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[39] This is the cut-off date alleged in the complaint, as amended at the hearing.

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6. The Financial and Contract Data Issue

The complaint alleges that on various occasions during the 1964 negotiations, the Union requested certain data relating to Respondent's financial position, income, and costs; that Respondent has refused to furnish such data; that such data was necessary to enable the Union to bargain intelligently with regard to certain proposals by Respondent for reduction in employee benefits; and that by such refusal Respondent violated Section 8(a)(5) and (1) of the Act.

As already related, early in the negotiations (on July 24), Respondent struck a note which pervaded the later bargaining—namely, that its objective in the negotiations was to secure reduction of its labor costs, particularly employee fringe benefits, which it contended were higher than those of most of its competitors, and thereby were adversely affecting its competitive position, and resulting in the loss of contracts awarded on the basis of competitive bidding. When, on August 21, Laird asked Respondent for more details as to the relative cost of employee fringe benefits and the contracts allegedly lost because of the cost of such benefits, Respondent suggested that he put his request in writing, for consideration by Respondent's legal counsel. When Laird orally renewed his request on August 25, Respondent proposed that he take the matter up with its comptroller, Kaploe, at the meeting scheduled for August 27. However, Kaploe did not appear at that meeting nor, so far as the record shows, at any subsequent meeting; and, according to Laird, Respondent vouchsafed no reply, when, on October 10, he orally asked for information on various items, including a profit and loss statement, and the names of eRspondent's competitors. Finally, on October 13, Laird addressed a letter to Respondent requesting the following

information as to the operations of its Federal Laboratories Division:

1. The names of major competitors.
2. Auditor's reports for the past 2 or 3 years with regard to income, profit and loss, net sales, cost of sales, selling and administrative costs, payroll and fringe benefit costs, ratio of such costs to net sales, ratio of other costs to net sales, overhead costs not properly chargeable to the Nutley plant, profits before and after taxes, current and total assets and liabilities, depreciation, surplus, and net worth.
3. Total compensation of management personnel.
4. Comparison of costs and prices of each of its major competitors.
5. Contracts lost during the last 2 or 3 years because it was not competitive.
6. The record of the Division as a separate entity and and its relation to that of Respondent's other divisions.
7. The accuracy of a newspaper report that it had on hand military contracts valued at $150 million dollars, and whether such contracts had been awarded to it because it underbid its major competitors.
8. The ratio of fringe benefits to total costs.
9. All factors considered by Respondent in determining competitive position.
10. Cost of certain management fringe benefits.
11. All other information in Respondent's possession on which it based its contention regarding its competitive position.

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The letter concludes with an offer that, to facilitate compliance with the Union's request, the pertinent books and records of Respondent be examined by a mutually acceptable certified accountant.

By letter of December 10, Respondent replied that it had been advised by counsel that it was not obliged to furnish the data requested, and it is implicit from the balance of the letter that this position was based on the view that Respondent had already divulged certain of the requested data in the course of the negotiations and that the Union was not entitled to any further disclosure, as Respondent was not pleading inability to pay. In this connection, the letter recites the following information, requested by the Union, and already supplied to it:

1. The names of nine competitors.
2. Two contracts lost by Respondent because it was not "competitive."
3. The fact that Respondent's net income after taxes was less than one percent of sales.
4. The total cost of each of 10 fringe benefit items.

Laird admitted at the hearing that Respondent in the negotiations disavowed any plea of inability to pay, professing only a desire to improve its competitive positon; that Respondent informed him that its competitors were "very big electronic company in the United States," and gave him the names of at least some of its competitors who were though to have less liberal fringe benefits than Respondent; and that he knew of one contract lost by Respondent to a competitor.

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Respondent defends mainly on the ground that it had no obligation to furnish any of the requested data because, in justifying its proposals for reductions in fringe benefits, Respondent did not claim inability to pay the existing benefits but only that lowerng of its labor costs would improve its competitive position in bidding for contracts, and that its relatively generous, fringe benefits had been responsible for loss of contracts in competitive bidding. While it appears that Respondent, early in the negotiations, linked its demand for lower fringe benefits with the issue of job security and with a reference to a "fight for survival," I am satisfied from Laird's own testimony that Respondent made it sufficiently clear during the negotiations that it was claiming that it lacked the wherewithal to continue to pay the cost of the existing fringe benefits, but only that it deemed its fringe benefits to be so far out of line with those of its competitors as to be responsible for its loss of contracts to them. In any case, it is clear from Respondent's December 10 letter that that is its present position. Even so, it is well settled that an employer may be required to document, not only a plea of inability to pay, but also a plea that his competitive position is adversely affected by his high labor costs.[40]

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[40] *The Celotex Corporation*, 146 NLRB No. 8 (while this aspect of the *Celotex* case is not discussed in the Board's Decision, it was litigated before the Board on exceptions to the Trial Examiner's Report, and the issue is now before the United States Court of Appeals for the Fifth Circuit (Case No. 21994)); *Peerless Distributing Co.*, 144 NLRB 1510, *Cincinnati Cordage & Paper Co.*, 141 NLRB 72, 77; *Wheeling Pacific Company*, 151 NLRB No. 121.

Respondent cites *Charles E. Honaker*, 147 NLRB 145. However, in that case the Board held only that there was no duty to furnish

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In any case, it is clear that the Supreme Court's rationale in the *Truitt* case—[41] that good faith bargaining requires that a bargainer's claim "be honest claims," and that he be willing to support them by proof of their accuracy—is not in terms limited to a plea of inability to pay but would seem to apply with equal force to any assertion by a party in support of a bargaining demand, which is susceptible of documentation by data available to it and not available to the other party. Respondent's claim here of the worsening of its competitive position by its past liberality in the matter of fringe benefits was such an assertion and was susceptible of such documentation. It may be pointed out, however, that the nature of the data that a respondent may be required to produce may well be different when he pleads that he does not have the present means to pay certain benefits and when, as here, he complains only that the payment of existing benefits has caused him to lose

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financial data where the Respondent did not plead inability to pay, and, where, although professing a desire to "remain competitive" with similar operations in the area, Respondent meant thereby only that it did not wish to pay more than the prevailing rate (there being no real competition between it and the other like operations in the area). While there is some support for Respondent's position in *Taylor Foundry Co.*, 141 NLRB 675, enfd. 338 F. 2d 1003 (C. A. 5), the Board's statement therein cited by Respondent is mere dictum, and must be deemed in any case to be superseded by the square holdings to the contrary in the later cases cited above.

Finally, I find no merit in Respondent's contention that the Union forfeited any right it may have had to the data in question by not pressing its demand therefor with sufficient diligence. See the *Celotex Corporation, supra*, at p. 6 of Intermediate Report.

[41] *N.L.R.B.* v. *Truitt*, 351 U. S. 149.

contracts to competitors. While, in the former case, the Union would be entitled to an order requiring disclosure of all books and records relating to the respondent's financial status, in the latter case it would seem that the appropriate remedy would be to compel disclosure of only such data as the employer relied on in asserting that his competitive position had been so impaired by his generosity to his employees that he had lost out in bidding for contracts. Applying those principles here, I find that the Union was entitled to disclosure of the names of those competitors of Respondent whose fringe benefits were alleged to be lower than Respondent's and of the identity of all contracts allegedly lost during the term of the expiring collective-bargaining agreements because of underbidding by such competitors, together with any other data in Respondent's possession on which it relied in reaching the conclusion that such contracts were lost because of its relatively high fringe benefits or other labor costs.[42]

I find further that in its letter of October 13, if not before, the Union made an adequate, albeit inartistic, request for disclosure of such data as it was entitled to receive. (See particularly items 1, 5, and 11, of that letter, as set forth above.)

I find, finally, that, even if it be asumed that Respondent, as it claims, had already furnished to the Union all the data set forth in its letter of December 10, such disclosure would not satisfy the requirements of the Act, and that, by

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[42] The foregoing should not be construed as relieving Respondent entirely of the obligation to furnish any data as to its financial position, but as requiring that it furnish only such financial data as entered into its determination that its fringe benefit expense was responsible for its inability to underbid its competitors.

failing to make adequate disclosure, Respondent violated Section 8(a)(5) and (1) of the Act.[43]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

It will be recommended, *inter alia,* that Respondent be required to make available to the Union such data as Respondent may rely on in asserting in contract negotiations

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[43] The complaint, as amended at the hearing, alleged that the strike called on September 9 was caused or prolonged by Respondent's unfair labor practices. However, after the hearing counsel for the Union and for the Respondent advised me by letter that the strike had ended, and that they were informed by their respective clients that all strikers who sought reinstatement had been restored to their former jobs. The General Counsel does not dispute this (see Trial Examiner's Exhibits Nos. 5, 6, and 7). As there, accordingly, no longer appears to be any issue concerning reinstatement of the strikers, I do not deem it necessary to determine whether the strike was caused or prolonged by Respondent's unfair labor practices or was merely an economic strike.

that the relatively high cost of existing employee benefits is adversely affecting its competitive position or causing it to lose contracts.[44]

It has been found that Respondent violated Section 8(a)(1) of the Act by its delay in furnishing the seniority data relative to nonunit employees, requested by the Union. As such data has already been furnished, no useful purpose would be served by requiring that the same data be furnished again. However, it will be recommended that Respondent be required, upon request, to advise the Union of any personnel action taken, or any events occurring, since such data was supplied that are relevant to a determination of the seniority rating that would be acquired by nonunit personnel, if transferred into the appropriate bargaining unit pursuant to applicable contract provisions.

VI. Conclusions of Law

1. The bargaining units set forth in Appendices B and C, attached hereto, are appropriate for purposes of collective bargaining under the Act.

2. At all times here relevant the Union has been the statutory representative of Respondent's employees in the said bargaining units.

3. From July 20, to November 10, 1964, Respondent failed and refused to bargain in good faith with the Union as the representative of Respondent's employees in the foregoing units, thereby violating Section 8(a)(5) and (1) of the Act.

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[44] However, in complying with this requirement, Respondent need not supply the Union with the names of all its major competitors, as it already did so in its letter of December 10, if not before.

4. Since, at least, December 10, 1964, Respondent has it to verify Respondent's claim that the level of existing refused to disclose to the Union data necessary to enable fringe benefits was adversely affecting Respondent's competitive position, and to enable the Union to bargain intelligently with regard to proposals for reduction of such benefits. By such refusal Respondent has violated Section 8(a)(5) and (1) of the Act.

5. Between January 15, and October 22, 1964, Respondent violated Section 8(a)(1) of the Act, by refusing to furnish the Union with certain data requested by it relating to the seniority that would be acquired by nonunit personnel, if they were transferred into the foregoing bargaining units.

6. By coercively soliciting strikers to return to work, Respondent violated Section 8(a)(1) of the Act.

7. The "mixed" unit for which the Union was certified by the Board in 1951 was not, and is not now, appropriate for collective bargaining, because of the joinder therein of professional and nonprofessional employees, without affording the former an opportunity to vote for separate representation. By refusing on and after October 8, 1964, to recognize the Union as the representative of such unit, and by refusing to furnish the Union with merit review data relative to the employees in such unit, Respondent has not violated Section 8(a)(5) and (1) of the Act.

Recommended Order

Upon the entire record in this proceeding and the foregoing findings of fact and conclusions of law, Respondent, International Telephone & Telegraph Corporation, Nutley, New Jersey, its officers, agents, successors, and assigns, shall:

Appendix C

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, as the exclusive representative of Respondent's employees in the bargaining units set forth in Appendices B and C, attached hereto.

(b) Refusing to disclose to the aforesaid labor organization all data in Respondent's possession, on which it may rely in asserting the contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive position or has caused it to lose contracts.

(c) Offering strikers special inducements to return to work and threatening them with loss of benefits if they do not return.

(d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist a labor organization including the above Union, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

Appendix C

(a) Upon request, bargain in good faith with Local 400 International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, with respect to the terms and conditions of employment of the employees in the units described in Appendices B and C, attached hereto, and if an understanding is reached, embody it in a signed statement.

(b) Upon request, make available for inspection by said union, information concerning any personnel actions or any other events occurring since October 13, or 22, 1964, that are relevant to a determination of the seniority that would be acquired within the foregoing units by nonunit personnel, if transferred into such units pursuant to applicable contract provisions.

(c) Post at its plant in Nutley, New Jersey, copies of the notice attached hereto and marked Appendix "A."[45] Copies of said notice, to be furnished by the Regional Director for the Twenty-Second Region, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[45] If this Recommended Order is adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in such notice. If this Order is enforced by a decree of the United States Court of Appeals, the notice shall be further amended by substituting for the words "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

(d) Notify the Regional Director for the Twenty-Second Region, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.[46]

Dated at Washington, D. C., April 15, 1965.

SIDNEY SHERMAN
Trial Examiner

Appendix "A", Annexed to Foregoing Trial Examiner's Decision

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER
NATIONAL LABOR RELATIONS BOARD
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

We will bargain collectively upon request, with Local 400, International Union of Electrical Radio & Machine Workers, AFL-CIO, as the exclusive representative of our employees in the appropriate units described in Appendices B and C, attached hereto, with respect to rates of pay, wages, hours of employment and other conditions

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[46] If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

of work and, if an understanding is reached, embody it in a signed agreement.

We will disclose to said labor organization, upon request, all data in our possession on which we may rely in asserting in contract negotiations that the relatively high cost of existing employee benefits is adversely affecting our competitive position or causing us to lose contracts. We will furnish to said labor organization, upon request, information concerning any personnel action taken, or event occurring, since October 13 or 22, 1964, that is relevant to a determination of the seniority that would be acquired by nonunit personnel, if transferred into the foregoing bargaining units pursuant to applicable contract provisions.

We will not offer to strikers special inducements to return to work or threaten them with loss of benefits if they do not return.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

INTERNATIONAL TELEPHONE & TELEGRAPH CORP.
(Employer)

Dated ..... By .....
(Representative) (Title)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or comlpiance with its provisions, they may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102 (Tel. No. Market 4-6151).

Appendix "B", Annexed to Foregoing Trial Examiner's Decision

(Clerical-Drafting Unit)

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Buyer "A"

Buyer "B"

Buyer "C"

Planner "A"

Planner "B"

Planner "C"

Technical Clerk "A"

Technical Clerk "B"

Photographer "A"

Photographer "B"

Photographer Helper "A"

Photographer Helper "B"

Appendix C

Secretary

Stenographer "A"

Stenographer "B"

Typist "A"

Typist "B"

Vari-Typist "A"

Vari-Typist "B"

Statistical Typist

Clerk Reproduction "A"

Clerk Reproduction "B"

Clerk Reproduction "C"

Clerk "A"

Clerk "B"

Clerk "C"

Junior Clerk

Telephone Operator

Senior Designer

Designer

Layout Draftsman "A"

Layout Draftsman "B"

Detailer

Senior Designer—Telephone

Designer—Telephone

Appendix C

Technical Illustrator (Artist) Senior

Technical Illustrator Senior

Technical Illustrator (Artist)

Technical Illustrator

Appendix "C", Annexed to Foregoing Trial Examiner's Decision

(SHOP-MAINTENANCE UNIT)

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Sr. Laboratory Mechanic

Exp. Tool & Die Maker*

Exp. Machinist

Machinist "A"

Machinist "B"

Inspector "A"

Inspector "B"

Exp. Glassblower

Glassblower "A"

Glassblower "B"

Exp. Engraver

Exp. Sheetmetal Worker*

Sheetmetal Worker "A"

Sheetmetal Worker "B"

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Sheetmetal Worker "C"
Exp. Painter
Exp. Welder
Welder "A"
Exp. Assembler—Mechanical
Assembler "A"—Mechanical
Exp. Assembler—Vacuum Tube
Mounter Assembler
Mounter Assembler "B"—Vacuum Tube
Exhaust Operator "A"
Exhaust Operator "B"
Wireman "A"
Wireman "B"
Wireman "C"
Inspector Equipment
Inspector Tester—Transformer
Wireman and Transformer Worker
Inspector—Process
Inspector—Receiving
Stock Clerk "A"
Stock Clerk "B"
Receiving and Shipping Clerk
Warehouseman

Appendix C

Carpenter "A"

Carpenter "B"

Electrician "A"

Electrician "B"

Plumber Mechanic "A"

Plumber Mechanic "B"

Maintenance Mechanic "A"

Maintenance Mechanic "B"

Machine Repairman

Painter "A"

Painter "B"

Maintenance Helper

Cleaner

Chauffeur

Chauffeur's Helper

Aircraft Mechanic

Potter

Helper, Laboratory

Appendix C

Appendix "D", Annexed to Foregoing Trial Examiner's Decision

The transcript of testimony taken herein is hereby ordered corrected as follows:

	Page	*Line*	*Error*	*Correction*
1.	13	6	29	92
2.	40	25		insert "about" before "Cammarata"
3.	44	7	contract	request
4.	86	15 & 16	classified	constituted
5.	95	14	31	3
6.	132	5	element	agreement
7.	141	20 & 21	they	we
8.	141	22	us	them
9.	181	25	two hundred	twenty-eight hundred
10.	182	22	9th	19th
11.	291	14		insert "be" before one
12.	293	8	continued	could not go
13.	304	12	submitting	competing
14.	304	13		strike "company"
15.	388	13	fact	strike
16.	421	4	allege	amend
17.	421	4	date	complaint

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18.	423	21 & 22	apprised	surprised
19.	447	12	either direct	do so either
20.	462	7		insert "in" after "But"
21.	470	3	That	They
22.	470	3	signus	in status
23.	471	20	revert	revoke
24.	481	15	shows if	if you show
25.	534	13		insert "not" after "might"
26.	544	25	take	tell
27.	545	12	active	accurate
28.	545	19	we	he

Appendix C

Errata Sheet, Annexed to Trial Examiner's Decision of April 15, 1965

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION
(ITT FEDERAL LABORATORIES)

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Cases Nos. 22-CA-2015 and 22-CA-2131

ERRATA

The Trial Examiner's Decision issued in the above case on April 15, 1965, is hereby ordered corrected as follows:

1. Page 8, ll. 29-30, change "classification designed" to "classifications designated."
2. Page 21, l. 56, change "the" to "in" before "contract."

SIDNEY SHERMAN
Trial Examiner

Dated: April 16, 1965.

APPENDIX D

Decision and Order of National Labor Relations Board (Re: I.T.T. Federal Laboratories, *et al.*, and Professional Employees, etc., *et al.*)

D-8775
Nutley, New Jersey

159 N.L.R.B. No. 145

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION
(ITT FEDERAL LABORATORIES)[1]

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Cases Nos. 22-CA-2015, 22-CA-2131

PROFESSIONAL EMPLOYEES OF I. T. T. FEDERAL LABORATORIES, A DIVISION OF INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION

Petitioner

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO UNION
Case No. 2-RC-2282[2]

[1] The Respondent's name appears in the caption as amended at the hearing.

[2] For purposes of decision, we have consolidated Case No. 2-RC-2282 with Cases Nos. 22-CA-2015 and 22-CA-2131.

Appendix D

DECISION AND ORDER

On April 15, 1965, Trial Examiner Sidney Sherman issued his Decision in cases numbered 22-CA-2015 and 22-CA-2131, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the General Counsel, the Respondent, and the Charging Party filed exceptions to the Trial Examiner's Decision, together with supporting briefs. The Respondent also filed a brief in answer to the exceptions and briefs filed by the General Counsel and the Charging Party.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, except as modified below.

1. The Trial Examiner found, and we agree, that the Respondent did not violate Section 8 (a) (5) and (1) of the Act by conditionally refusing to advance the date on which the Respondent and Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter called the Union, usually commenced their contract negotiations. Accordingly, we shall dismiss this allegation of the complaint.

2. The Trial Examiner also found, and we agree that the Respondent engaged in bad faith bargaining with the Union in the shop-maintenance and clerical-drafting units from July 20, 1964, to November 10, 1964, by entering into and conducting negotiations with a fixed determination to avoid, rather than reach, an agreement, in violation of Section 8(a)(5) and (1) of the Act.[3]

3. We similarly agree with the Trial Examiner's finding that the Respondent further violated Section 8(a)(5) and (1) by failing to disclose to the Union certain financial and other data upon which the Respondent relied in support of its claim that it was losing competitive contracts because of the high cost of its fringe benefits and/or other labor costs.

4. The Trial Examiner also found that the Respondent violated Section 8(a)(1) and not Section 8(a)(5) of the Act by refusing, for a period of 9 months, to furnish information requested by the Union pertaining to the seniority of nonunit employees. While we agree that the Respondent's refusal indeed violates the Act, we base our

[3] In adopting the Trial Examiner's finding, that Respondent violated Section 8(a)(5) and (1) by engaging in unlawful "surface bargaining," we rely not only upon the factors considered by him in reaching that conclusion but also upon the Respondent's unlawful refusal to provide adequate documentation of its "cost reduction" position throughout the negotiations. The latter position was one of the principal bones of contention at all such times. Our colleagues' disagreement with our finding as to "surface bargaining" appears inconsistent with their holding, in agreement with us, that Respondent's refusal to provide adequate documentation of its "cost reduction" position was itself a violation of Section 8(a)(5) and (1).

conclusion on grounds somewhat different from those of the Trial Examiner.[4]

In this regard, the record shows that the contract between the parties provided that nonunit employees would accumulate seniority for time spent in nonunit positions and, upon transfer into a unit, would be entitled to bump unit employees who had less total seniority. Transfer into a unit could occur if there was a layoff of nonunit personnnel, if the Respondent offered such laidoff employee the opportunity to go into a unit, and if the employee accepted the offer. In 1963, the Respondent laid off 600 to 700 unit employees and thereafter transferred 2 nonunit employees into a unit, one of whom, because of his seniority, bumped a less senior unit employee. Some unit employees thereupon questioned the possible effect similar transfers might have on their seniority and job status. Consequently, the Unoin requested that the Respondent furnish it with a list of nonunit employees eligible for transfer into a unit and also requested information pertaining to the seniority and job classifications of management employees who might be transferred into a unit. The stated purpose of these requests was to enable the Union to administer its contract, i.e., to enable the Union to advise unit employees of these seniority facts and the possible adverse effects such transfers might have upon their unit seniority, and also to assist

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[4] The Trial Examiner found that any union activity which serves or aids employees in their right to engage in concerted activities for their "mutual aid or protection" is protected by Section 8(a)(1). Based thereon, the Trial Examiner further found that the Respondent's 9-month refusal to supply the nonsuit seniority data frustrated the Union's discharge of its duty to aid employees to enjoy their Section 7 "mutual aid or protection" guarantee, in violation of Section 8(a)(1).

unit employees in making and carrying out decisions regarding their jobs as a result of such transfers, or possible transfers, into a unit. The Respondent, however, refused to supply such data for a period of 9 months contending, in effect, that it was under no obligation to furnish the Union with information pertaining to nonunit employees.

The Union's right to such data, however, turns not on whether the employees to whom the data refers are in a unit, but rather on whether the data itself is necessary[5] and relevant[6] to the Union's role as bargaining representative. Where, as here, the requested information relates to the possibility of unit job displacement by nonunit employees, we do not see how the Union could properly detect infractions of the contract or institute grievances in order to protect the rights of unit employees improperly or adversely affected by such transfers unless it were given the requested information. Nor do we see how the Union could intelligently discharge its further bargaining function of counselling and advising unit employees of their rights and status under the contract which the Union negotiated for them unless the Union had access to such data.

Accordingly, we find that the nonunit seniority information requested by the Union was both necessary and relevant to enable the Union to discharge its statutory bargaining function of administering its contract and that the parties litigated this matter within this conext. We further find that the Respondent, by refusing to furnish the Union with the requested nonunit seniority data for a

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[5] *Curtiss-Wright Corporation, Wright Aeronautical Division*, 145 NLRB 152, 156-157.

[6] *Acme Industrial Co.*, 150 NLRB No. 144.

period of 9 months, violated Section 8(a)(5) and (1) of the Act.

5. The Trial Examiner found that the Board's 1951 certification in the engineer-technician unit was void *ab initio*, that the Respondent was at no time ever obligated to bargain with the Union in this unit, and that the Respondent, therefore, did not violate Section 8(a)(5) of the Act by withdrawing recognition from and refusing to bargain with the Union as bargaining representative of the professional employees in this unit. The General Counsel and the Union except to these findings. We find merit in such exceptions.

At the outset, we think it relevant to the resolution of this issue to set forth the history of bargaining in this unit. In 1945, the Board found appropriate, *inter alia*, an engineering unit[7] composed of Respondent's engineers, assistant engineers, engineers' assistants, jr. engineers, laboratory assistants, sr. laboratory technicians, and sr. engineers, and directed an election therein.[8] This direction of election, however, did not result in a certification in the engineering unit. In 1946, pursuant to a consent election agreement, an election was held in this engineering unit and a bargaining representative was certified by the Board. In 1947, as a result of negotiations by these parties relative to job descriptions and classifications in the unit, modifications in the original unit composition were made by eliminating the titles "laboratory technicians" and "engineers" assis-

[7] In this 1945 proceeding, the Board also found appropriate two other units of the Respondent's employees, namely, a shop unit and a clerical unit.

[8] *Fedar Telecommunications Laboratories, Inc.*, 63 NLRB 947.

tants" and the parties created and substituted the titles "Technicians A, B, and C." In 1948, the contracting parties redesignated the shop unit and the clerical unit as the shop-maintenance unit and the clerical drafting unit, respectively, and also redesignated the engineering unit as the engineer-technician unit.

In 1951, a representation hearing was held pursuant to a petition filed by the instant Union under Section 9(c) of the Act. In that proceeding, in which the 3 units, as redesignated, were involved, all parties agreed, with respect to the engineer-technician unit, that the engineers (and chemists) were professional employees but disagreed as to the status of the technicians theretofore included in this unit. The Union contended that the technicians were professional employees while the Respondent contended that they were not. The Board held that it was unnecessary to determine the status of the technicians since the record established that the unit was composed predominantly of employees whom the parties agreed were professional employees. Upon finding a community of interest and "in accordance with established precedent," the Board included the technicians in the professional unit without affording the professional employees a separate vote as provided for in Section 9(a)(1) of the Act.[9] Accordingly, the Board, in essense, continued in effect the units theretofor created by the parties by finding the aforementioned shop-maintenance, clerical-drafting, and engineer-technician units to be appropriate, and, pursuant to an election, certified the in-

[9] Section 9(b)(1) provides in pertinent part that ". . . the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . . ."

stant Union as bargaining representative of the employees in these units.[10]

This matter then lay at rest for over 13 years during which the parties bargained continuously in this unit. It was revived at the instant hearing wherein adduced evidence established that the technicians who were included in the engineer-technician unit in 1951 were, indeed, nonprofessional employees.

The Respondent, however, despite the objection raised in the 1951 proceeding, has maintained a continuous relationship with the Union in these 3 units through collective bargaining agreement excuted in 1951, 1952, 1954, 1956, 1959, and a Strike Settlement Agreement executed in 1961, which, by its terms, expired on September 9, 1964. In addition, the Respondent did not raise any further objection as to the composition of any unit until October 8, 1964, at which time employees in all 3 units, including the professional employees, were engaged in a strike.[11] On this date,

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[10] *Federal Telecommunication Laboratories, Inc.*, 92 NLRB 1395.

[11] The Trial Examiner found that it was unnecessary to determine whether the strike, which began on September 9, 1964, was an economic strike or an unfair labor practice strike which had been caused or prolonged by the Respondent's unfair labor practices. The General Counsel excepts to the Trial Examiner's failure to find that the strike was an unfair labor practice strike either from its inception or from the time of the Respondent's withdrawal of recognition from the Union as bargaining agent for the professional employees in the engineer-technician unit. At the hearing, however, the General Counsel did not litigate the issue relative to the cause of the strike but instead took the position that the strike was an economic strike which became converted into an unfair labor practice strike by the Respondent's withdrawal of recognition. In any event, in view of the information received by the Trial Examiner subsequent to the hearing to the effect that all of the strikers who had sought reinstatement had been returned to their former jobs (Trial Examiner's Decision, p. 20, footnote 43), we find it unnecessary to resolve this matter as no useful purpose would be served by so doing.

the Respondent withdrew recognition from, and refused to bargain with, the Union as representative of the professional employees in the engineer-technician unit.[12] On this same day, the Respondent also filed 2 petitions under Section 9(c) of the Act requesting that elections be held either in a unit limited to professional employees, or alternatively, in the existing certified unit of professional and nonprofessional employees. The Respondent grounded its withdrawal of recognition on the unsupported claim that it doubted that the Union still represented a majority of employees in this unit because a substantial number of professional employees had abandoned the strike by October 8, and because a group of professional employees in the engineer-technician unit had, on the previous day, filed a decertification petition seeking an election in a unit consisting of professonal employees only.[13] The Trial Examiner correctly found that the Union represented a majority of the unit employees at the time of Respondent's withdrawal of recognition, and, further that the Respondent at that time did not have a good-faith doubt of the Union's majority in the unit. At the hearing, the Respondent, relying mainly upon *Leedom* v. *Kyne*, 358 U.S. 184, contended that its withdrawal of recognition from and refusal to bargain with regard to the professional employees did not violate Section 8(a)(5) and (1) of the Act because the Board's 1951 finding that the engineer-technician unit was appropriate

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[12] There is no controversy as to the Union's representative status with regard to the nonprofessional employees in this unit, or as to the other 2 units, or as to the present composition of the engineer-technician unit which the General Counsel and the Union admit contains both professional and nonprofessional employees.

[13] All 3 petitions were dismissed by the Board because of the pendency of the unfair labor practice charges filed in the instant cases.

was made without affording the professional employees a separate election as provided in Section 9(b)(1) of the Act, and that, therefore, the Respondent was not obligated to bargain with the Union because the Union's certification as representative of this unit was not binding on the Respondent. The Trial Examiner upheld the Respondent's contention. We disagree.

For purposes of decision here, we assume that *Leedom* v. *Kyne,* although factually distinguishable in at least one respect,[14] is applicable to the Board's unit determination in Case No. 2-RC-2282 and that the certification which was issued in that case in 1951 was therefore invalid. But, as we point out below, it does not follow from the fact that the 1951 certification was a nullity, that the engineer-technician unit, as it was constituted in 1964 after a lengthy bargaining history, was either illegal or inapropriate. The issue in this case is not whether *Leedom* v. *Kyne* is applicable to the Board's action in Case No. 2-RC-2282. Rather, it is whether the rule of that case is applicable to the Respondent's withdrawal of recognition in 1964, in the middle of negotiations and after a 14-year history of bargaining. In the particular circumstances of this case we hold that it is not.

We believe this case to be governed by the same considerations that guided our decision in *Vincent Drugs,* 144 NLRB 1247. In that case it was argued that the Board

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[14] In *Leedom* v. *Kyne,* there had been no history of bargaining for a mixed unit of professional and nonprofessional employees prior to the Board's certification. Here, as mentioned earlier, there was already an established engineer-technician unit in existence at the time of the 1951 certification, and a 5-year history of bargaining in it, albeit with another labor organization.

under no circumstances could consider a combined unit of professionals and nonprofessionals to be appropriate unless the professionals at some time had been afforded an opportunity to vote for exclusion as provided in Section 9(b)(1). In rejecting that argument, we noted, *inter alia*, that nothing in the statute either condemns such a unit as illegal or declares it inherently inappropriate. On the basis of our analysis of the legislative history, we concluded that Section 9(b)(1), although precluding *the Board itself* from initially establishing such a mixed unit in a representation proceeding without a self-determination election, does not preclude an *employer and a union* from voluntarily establishing and maintaining such a unit as one appropriate for collective bargaining. We reiterate and reaffirm here what we stated in *Vincent Drugs* on this subject.

On the record here, we think there can be little doubt that the mixed unit which both parties recognized as appropriate when they entered upon their 1964 negotiations was bottomed upon a consensual arrangement rather than upon any mistaken belief by either party that the 1951 Board action possessed a continuing vitality. The parties' entire course of conduct since 1951, including the negotiation of six collective-bargaining agreements during this period, clearly evidences their mutual intent to maintain a bargaining relationship in an engineer-technician unit, without reference to the 1951 certification or reliance upon it. This is apparent ip nart from the record evidence disclosing the many revisions, amendments and clarifications in classifications that were made from time to time in the unit composition covered by the contracts negotiated since 1951. These modifications, although not so substantial as to change the basic unit, have, however, so altered the 1951 certification as to make clear that the parties, at least in recent years,

have viewed this relationship as founded on consent rather than on the Board's 1951 certification.

The consensual foundation for the parties' continued dealings in the engineer-technician unit is even more apparent from other aspects of the bargaining history. Thus, even after the Supreme Court decided *Leedom* v. *Kyne* in 1958, the parties continued to bargain in the engineer-technician unit, just as they had done before, concluding a new agreement in 1959 and again in 1961. Had the Respondent been unwilling to accept the unit on a voluntary basis, opportunities were available to it to test the unit question at the time of the 1959 and 1961 reopenings. It took no steps to do so. Its entry into the 1964 negotiations was a further affirmation of its continued acceptance of the historically established unit. Significantly, it was not until after such negotiations had been underway for some time, and a strike had occurred, that the Respondent decided to withdraw recognition from the Union as the representative of the mixed unit, even though, as found above, it then had no reasonable basis to doubt the Union's continued majority status in that unit. The withdrawal occurred in a context of other and still unremedied unfair labor practices, as herein found, which would have precluded an opportunity for a free and fair election.

In view of the foregoing, we can give no credence to the Respondent's claim that its acceptance of the unit rested upon the 1951 certification rather than upon voluntary consent. On the contrary, we find that the unit which both parties recognized as appropriate when they entered into their 1964 negotiations was a product of the agreement of the parties. Bearing in mind that such a unit is not inherently inappropriate, and considering particularly the long bargaining history in that unit, as well as the timing and con-

text of the Respondent's withdrawal, we hold that the Respondent is estopped at this time from disputing the appropriateness of the unit which it itself had accepted as a proper basis for bargaining during the very negotiations which it later disrupted by its withdrawal of recognition.[15] Accordingly, we find that the Respondent, by withdrawing recognition from and refusing to bargain with the Union as bargaining representative of the professional employees in

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[15] Our holding here is not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time and in the appropriate proceeding now is not an appropriate time because of the Respondent's unremedied unfair labor practices.

Our dissenting colleagues argue that because the unit was "illegitimate at birth," it could not thereafter under any circumstances achieve "respectability."

We think, however, that the honorable nature of the bargaining relationship's birth in 1946 and of its growth and development by consent in its later life should be given some consideration as against the stigma of the 1951 certification, on the sole basis of which our dissenting colleagues would illigitimatize the relationship at the option of one of its theretofore willing participants at a time when it was engaged in interposing other unlawful obstacles to good faith bargaining.

As noted above, we recognize that the policy laid down by Congress in 9(b)(1) would in a proper case require the granting of a separate election to professional employees at a proper time, notwithstanding that long bargaining history.

We hold here only that Congress could not have intended the 9(b)(1) requirement to be applied in such a manner as to provide a shield behind which one party, after having benefited from the bargaining relationship for so many years, may with impunity in mid-negotiations, for whatever tactical advantage it hopes to secure, seek to shatter the bargaining structure it has itself joined to create.

the engineer-technicial unit has violated 8(a)(5) and (1) of the Act since October 8, 1964.[16]

6. Based upon his findings that the Respondent was not obligated to bargain with the Union as representative of the professional employees in the engineer-technician unit, the Trial Examiner also found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with certain merit review data pertaining to this mixed unit. We do not agree.

The record shows that the most recent contract between the Respondent and the Union provided for the bi-annual payment of merit increases to designated professional employees in the engineer-technician unit from a fund allocated by the Respondent. The fund itself was divided into 2 parts, one part consisting of two-thirds of the fund, and the other one-third. With regard to the two-thirds portion, the recipients and amounts of merit increases were to be determined by the Respondent, and if, after discussing the Respondent's selections and amounts with the Union "there is no agreement," the Respondent had the right to grant increases to those employees selected by it. The designation of recipients and distribution of amounts of the re-

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[16] We also find that the reasons set forth by the Trial Examiner with regard to the Respondents' bad-faith bargaining in the shop-maintenance and clerical-drafting units apply with equal force to the Respondent's bargaining in the engineer-technician unit. Accordingly, we find that the Respondent also engaged in bad-faith bargaining with the Union in the engineer-technician unit from July 20, 1964, to October 8, 1964, by entering into and conducting negotiations with the Union in this unit with a fixed determination to avoid, rather than reach, an agreement, in violation of Section 8(a)(5) and (1) of the Act.

maining one-third portion was subject to the Union's acceptance of those selected by the Respondent with the right to arbitrate unresolved disputes. The Union did not agree with the Respondent's selection and distribution with regard to the two-thirds fund portion due for 1963, and on June 1 and 3 of 1964, requested the merit review evaluation factors used by the Respondent to "rate this money." The Union requested this data in order to submit equitable recommendations as to the proposed recipients of the one-third portion of the fund due for 1963, but which had not yet been distributed. The Respondent, however, refused to submit the requested information to the Union on the ground that the contract contained no provision requiring it to furnish such data.

The merit review data sought by the Union was, like the seniority data discussed *supra*, necessary and relevant to the Union's role as bargaining representative. Thus, the Union requested this information to enable it to meet its contractual obligation of discussing both parts of the merit review fund, and, with this same information, to process any grievances which might arise as to the one-third portion of the fund. Further, the record shows that the merit valuation data sought pertained to merit increases, which, themselves, constitute a mandatory subject of bargaining because they are a part of the wage structure.[17]

In view of the foregoing, we conclude that Respondent, by refusing to furnish the merit evaluation factors requested by the Union, has violated Section 8(a)(5) and (1) of the Act.[18]

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[17] *E. W. Scripps Company*, 94 NLRB 227, 228.

[18] *Curtiss-Wright Corporation, Wright Aeronautical Division, supra.*

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7. The Trial Examiner found that the Respondent, by means of threats and promises, unlawfully solicited 2 of approximately 1100 striking employees to abandon the strike, in violation of Section 8(a)(1). In view of the other violations committed by the Respondent, we agree with the Trial Examiner that these solicitations were not isolated but, instead, warrant the issuance of a remedial order.

PETITION FOR REVOCATION OF CERTIFICATION
CASE NO. 2-RC-2282

On April 3, 1965, a group of professional employees in the engineering-technician unit filed the above-captioned petition which, in effect, seeks to have the 1951 certification in this unit declared void ab initio. As we have previously indicated in our discussion of this unit in the foregoing unfair labor practice cases, the subsequent bargaining history of the parties reflects that the parties have not relied on the certification and that the certification no longer has any efficacy. Accordingly, we find that the issue raised by this petition is moot.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, International Telegraph & Telephone Corporation (ITT Federal Laboratories), Nutley, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, as the exclusive representative of

Respondent's employees in the engineer-technician bargaining unit and the bargaining units set forth in Appendices B and C attached hereto.

(b) Refusing to disclose to the aforesaid labor organization data in the Respondent's possession pertaining to the seniority of nonunit employees who have been, or might be, transferred into a unit.

(c) Refusing to disclose to the aforesaid labor organization the merit review evaluation data relied upon by the Respondent in allocating the two-thirds portion of the merit fund to professional employees in the engineer-technician bargaining unit.

(d) Refusing to disclose to the aforesaid labor organization such data as Respondent relied, or may have relied, upon in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive status or has caused it to lose competitive contracts.

(e) Offering strikers special inducements to return to work and threatening them with loss of benefits if they do not return.

(f) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist labor organizations, including the above Union, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employ-

ment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, with respect to the terms and conditions of employment of the employees in the engineer-technician unit and in the units described in Appendices B and C, attached hereto, and if an understanding is reached embody it in a signed agreement.

(b) Upon request, make available for inspection by the aforesaid labor organization data in its possession pertaining to the seniority of nonunit employees who have been, or might be, transferred into a unit.

(c) Upon request, make available for inspection by the aforesaid labor organization the merit review evaluation data relied upon by it in allocating the two-thirds portion of the merit fund to professional employees in the engineer-techician bargaining unit.

(d) Upon request, make available for inspection by the aforesaid labor organization such data as it relied, or may have relied upon, in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting its competitive status or has caused it to lose competitive contracts.

(e) Post at its plant in Nutley, New Jersey, copies of the attached notice marked Appendix "A".[19] Copies of

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[19] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

said notice, to be furnished by the Regional Director for Region 22, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 22, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. June 29, 1966

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FRANK W. MCCULLOCH,

Chairman

.....

GERALD A. BROWN

Member

.....

SAM ZAGORIA,

Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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Members Fanning and Jenkins, concurring in part and dissenting in part:

We agree with the majority that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to disclose to the Union certain financial and other data upon which the Respondent relied in support of its claim that it was losing competitive contracts because of the high cost of its fringe benefits and/or other labor costs, and by refusing, for a 9-month period, to furnish information requested by the Union pertaining to the seniority of nonunit employees. We would also find, like our colleagues, that the Respondent did not violate the Act by conditionally refusing to advance the date on which the parties usually began their contract negotiations. We do not agree, however, that the Respondent did not otherwise bargain in good faith or that the engineer-technician unit is an appropriate bargaining unit within the meaning of the Statute.[20]

1. We do not believe that the record warrants holding that the Respondent entered into and thereafter conducted negotiations with a fixed determination to avoid rather than reach an agreement with the Union in any unit whatsoever. In reaching a contrary conclusion, our colleagues have failed to consider the entire course of bargaining. Instead

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[20] Member Fanning would, in view of the other violations, also find Respondent's effort to induce 2 of 1100 striking employees to abandon the strike to violate Section 8(a)(1). Member Jenkins would, in view of the fact that there is no other independent violation of Section 8(a)(1), find this conduct of Respondent to be isolated and insufficient basis for a finding of a separate violation of 8(a)(1). Cf. *Middleton Manufacturing Company, Inc.*, 141 NLRB 234, 244; *Twin-Kee Manufacturing Co., Inc.*, 130 NLRB 614, 616.

they have adopted the Trial Examiner's limited findings that the Respondent's entry into negotiations was predicated on bad faith because of certain statements made by the Respondent's labor relations manager prior to the commencement of negotiations, and that the Respondent thereafter engaged in surface bargaining because the Union's proposals for improvements in existing fringe benefits were met by the Respondent's counter proposals for reductions in such benefits. More specifically, the Trial Examiner found illegality in the Respondent's proposal to reduce severely existing pension benefits and in an alleged "package" offer proposal. We do not subscribe to these conclusions.

With regard to the prenegotiation statements, the record shows that on two occasions prior to the commencement of negotiations, Carey, the Respondent's labor relations manager, and a Union steward became embroiled in heated disputes concerning certain grievances and that, on both occasions, Carey stated that the Respondent could no longer live with some of the current contract provisions and was preparing contract proposals of such a nature that it would take a long strike in order to condition the Union to accept them.

The contract negotiations began on July 20, 1964. The record establishes that the theme dominant throughout the ensuing 16 bargaining sessions was quickly established at the second meeting when, in answer to the Union's demands for increased fringe benefits, the Respondent informed the Union that it was seeking a reduction in overall labor costs, and, therefore, sought specifically to reduce fringe benefit outlays. Although the Respondent repeatedly iterated this position throughout the bargaining, the Union also remained firm in its position. Neither party

conceded anything to the other until the eleventh meeting held on September 8, 1964. Union president Laird testified, in effect, that at that time, the Respondent agreed to modify many of its positions with regard to the Union's demands and made fringe and nonfringe concessions; the Respondent also presented a pension proposal which, while granting some items sought therein by the Union,[21] also proposed to severely reduce existing pension benefits. The Trial Examiner found, on the basis of Laird's testimony, that all these proposals were rejected because they were presented as a package proposal which the Union was obligated to accept or reject *in toto*.[22]

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[21] Although the record is not clear as to which items the Respondent granted, it is clear that the Union sought certain vesting rights, the elimination of social security deductions, the elimination of age requirements, and a bonus for early retirement.

[22] Whether Respondent's proposals were presented as a package or not seems to have little relevance to "good faith" in the bargaining, since there is nothing inherently objectionable to package proposals. However, to the extent it is material, it would appear that the Trial Examiner's finding of a package offer is against the weight of credible evidence. Laird, because of his inability to recollect the events which there took place, was permitted to testify on this matter from notes which he took at the meeting. On cross-examination, Laird admitted that he had given an affidavit to the General Counsel which stated that "these proposals were somewhat softened in an effort to induce the IUE not to go out on strike at the expiration of the contract on the following day." Laird also admitted that after he had completed the affidavit for the General Counsel, he took it to the office of the Union's attorney. Although there is no evidence to show that this attorney had attended any of the bargaining sessions or that he was authorized to administer oaths, the record shows that he struck out the above statement from the affidavit and substituted therefor the following: "These proposals were presented in a package. We were told they had to be accepted or rejected *in toto* and we couldn't accept some and reject some." Laird further admitted that the notes from which he testified contained no reference whatsoever to a package deal.

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On September 9, 1964, the current contract expired and the Union called a strike in which approximately 1100 employees represented by the Union participated. It was admitted at the hearing herein by the General Counsel, and was not otherwise litigated, that the strike was economic in nature and was not caused by any unfair labor practices. Despite the strike, however, the parties continued to bargain, and, at meetings held on September 19, 28, and October 10, 1964, the Respondent attempted to move toward an agreement by making further modifications and concessions in fringe and nonfringe items. The Union, however, which had presented 71 original demands at the first meeting held on July 20, 1964, (and also joined the other two unions not here involved in presenting 20 joint proposals), also presented 46 additional demands at the twelfth meeting held on September 19, 1960. Of these, 32 were apparently new, and it presented 25 more demands some of which were new, at the sixteenth session held on October 10, 1964. Moreover, during this entire course of bargaining, the Union apparently did not modify any of its positions except to change its demand for a 35-hour (from the established 40-hour) workweek with no loss of pay to a 37½-hour workweek with no loss of pay.

It is clear, therefore, that throughout the entire course of negotiations, the Respondent consistently sought to decrease its overall and fringe costs, and submitted proposals to this effect for consideration by the Union and in answer to the Union's proposals for increased benefits. This is also precisely what happened with regard to the Respondent's pension proposal.

On the basis of the foregoing, it would appear that the reasons relied upon for finding a violation are without foundation, and that, consequently, Carey's prenegotia-

tion statements cannot be construed as a forecast that "Respondent's bargaining strategy—was to take positions calculated to avoid agreement, and to provoke a prolonged strike that would so weaken the Union that it would be forced to capitulate." We do not believe that Carey's statements can be construed as anything more than mere intemperate remarks totally unrelated to the subsequent bargaining, or at worst, bluster designed to induce the Union negotiator to believe in the Employer's firmness in bargaining. Moreover, if the Respondent's negotiating conduct in general, and its September 8 pension proposal and alleged package proposal in particular, constituted bad-faith bargaining, then the strike which began on the following day would, perforce, be an unfair labor practice strike. Yet, it was admitted by the General Counsel at the hearing, and was not otherwise litigated, that the strike was an economic strike. Finally, we find no record support for the Trial Examiner's conclusion that despite fringe and nonfringe concessions made by the Respondent at the meetings of September 19, 28, and October 10, 1964, the net result of all of the bargaining was that "the parties were further apart than ever." We would find, instead, that the Respondent's concessions, even if unacceptable to the Union, and particularly when considered in context with the Union's increasing demands, clearly show that the Respondent was bargaining in good faith and was, in fact, endeavoring to reach an agreement.

2. Unlike our colleagues, we would find, in agreement with the Trial Examiner, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the bargaining representative of the professional employees in the engineer-technician unit.

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As related above, in 1951 the Board found that it was unnecessary to decide whether the techincians in this unit were professional employees, did not allow a self-determination election therein, and found that the unit was appropriate because it was composed predominantly of professional employees. Accordingly, the Board, following an election, certified the Union as representative of both the professional and nonprofessional employees in this unit.

Although the Respondent objected to this procedure, it nevertheless then entered into and, until October 8, 1964, maintained contractual relationships with the Union in this unit. On October 8, 1964, subsequent to the filing of petitions under Section 9(c) of the Act by the Respondent and by a group of professional employees in this unit, the Respondent withdrew recognition from, and refused to bargain with, the Union as representative of the professional employees in this mixed unit.

Section 9(b)(1) of the Act specifically states with regard to the unit appropriate for the purposes of collective bargaining that . . . "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . ." The legislative history of Section 9(b)(1), moreover, shows a considered Congressional purpose to restrict the power of the Board with regard to mixed unit determinations. The committee reports reflect that "When Congress passed the National Labor Relations Act, it recognized that the community of interests among members of a skilled craft might be quite different from those of unskilled employees . . ." The reports further reflect that corresponding recognition

should be afforded to the "special problems" of professional persons who "have a great community of interest in maintaining certain professional standards."[23] The House conference report explains the adoption of Section 9(b)(1) as a restriction imposed on "the Board" and designed to provide "substantially larger protection of [the professional employees' self-determination] rights *when bargaining units are being established* than has heretofore been the practice."[24] The obligation which Congress imposed on the Board is defined by Congress as being that ". . . the Board is *required* to afford such [professional] groups an opportunity to vote in a separate election to ascertain whether or not they wish to have a bargaining representative of their own."[25] From the foregoing, it seems clear that the intent of Congress when it enacted this provision was to prohibit the Board from finding appropriate mixed units that heretofore had been or in the future would be established by the Board, unless compliance was first had with the provisions of Section 9(b)(1).

This conclusion is, of course, supported by the *Kyne* case in which the Supreme Court overturned the Board's finding that a mixed unit was appropriate in the absence of a self-determination election. There the Court held, in effect, that such an election should have been conducted because "Section 9(b)(1) is [a] clear and mandatory" provision which prohibits the Board from deciding that any mixed

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[23] S. Report 105, 80th Cong., 1st sess., p. 11; 1 Leg. LMRA (1947) 417.

[24] H. Conf. Rept. 510, 80th Cong., 1st sess., p. 147; 1 Leg. Hist. LMRA (1947) 551.

[25] S. Report 105, 80th Cong., 1st sess., p. 11; 1 Leg. Hist. LMRA (1947) 417.

unit is appropriate unless a Section 9(b)(1) election is first had. The Court further held that professional employees could not be deprived of this election "right assured to them by Congress" by "an attempted exercise of power that had been specifically withheld" by Congress.

Our colleagues seek to distinguish *Kyne* on the ground that the issue presented in this case is not governed by the precepts contained in *Kyne,* but rather by the rationale contained in *Vincent Drugs.* We discern nothing in the statutory language or legislative history or even in the rationale set forth in *Vincent Drugs,* although the facts therein are inapposite, to support this distinction, and the Court's description of the Board's action in *Kyne* as "in excess of its delegated powers and contrary to a specific prohibition in the Act" (358 U. S. at 188) reinforces our conclusion.

Our colleagues, however, have determined that despite the invalidity of the 1951 certification, the provisions of Section 9(b)(1) have no relevancy to the contested issue and that the limited considerations attendant in *Vincent Drugs* have application to the circumstances present in the instant case. In reaching this conclusion, the majority has impliedly found that at some undefined time during or prior to 1964, the parties disestablished the certified unit, ceased relying on the 1951 certification, and tacitly entered into a new, voluntary, consensual arrangement.[26] These

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[26] In this connection, it should be noted that as the result of a dispute concerning classification in the engineer-technician unit, the matter went to arbitration, and that in his opinion rendered on July 11, *1960,* the arbitrator stated that ". . . I would be less than judicious if I ignored the certification upon which the contract recognition clause rests."

results, however, not only relegate to private parties the public powers possessed only by the Board, but also ignore the specific provisions of the Statute and the Congressional intent manifest therein, and unduly extend the application of the *Vincent Drugs* doctrine to circumstances which even *Vincent Drugs* itself would exclude.

That doctrine was established in a case which arose because of the Union's attempt to enforce a union-security clause and thereby cause the discharge of a professional employee who was included in a mixed unit which, 6 years previously, the parties had initially voluntarily established without the benefit of a Section 9(b)(1) election. Predicated on the findings that Section 9(b)(1) of the Act does not preclude the voluntary establishment of mixed units which, in themselves, are not inherently inappropriate, and in consideration of the long bargaining history between the parties, the Board dismissed the complaint. Thus in *Vincent Drugs,* the mixed unit was never certified by the Board nor was a representation election in the mixed unit sought. Both of these factors, however, are present in the instant proceeding and comport fully with the Board's interpretation of the limitations of the Board's powers as expressed in *Vincent Drugs,* namely, that Section 9(b)(1) "circumscribes the Board's discretion to determine the appropriate unit where an election is being sought in a unit including professional employees," and that Section 9(b)(1) is applicable when "a representation election is sought in a unit including professional employees and others."

We would find, therefore, that the 1951 certification is the basis of the entire relationship between the parties and that the limitations within which they governed their entire relationship was and is bottomed exclusively on that certification which only the Board and not the parties can

modify. The theory of self-help advocated by our colleagues can result only in interminable confusion with regard to bargaining units in particluar and collective bargaining in general.

Accordingly, we do not agree with the majority that the Respondent and the professional employees are now estopped from disputing the appropriateness of a unit which was admittedly illegitimate at birth and which could not, in our view, thereafter achieve the respectability now sought to be thrust upon it. Having reached this conclusion, we would further find that the Respondent and the professional employees have not abrogated their respective rights to contest the appropriateness of the unit because of their acquescence and participation in a long-established bargaining relationship, even though they did not do so until several years after *Kyne* was decided. There is no statue of limitations either proscribed or authorized to be imposed by Section 9(b)(1), nor can the public policy inherent in a self-determination election for professionals be the subject of waiver or estoppel of the parties.

We share our colleagues' apprehension that industrial stability achieved through long established bargaining units may be disturbed by voiding the certification here. However, we must also adhere to the legislative requirements manifested in Section 9(b)(1) of the Act until such time as Congress directs otherwise. Accordingly, we would find that the 1951 certification in the engineer-technician unit is void *ab initio*, that the Respondent was at no time ever obligated to bargain with the Union in this unit, and that the Respondent did not violate the Act by withdrawing recognition from and refusing to bargain with the Union as representative of the professional employees in the unit. Correspondingly, it follows, of course, that the Petition for

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Revocation of Certification should be granted in Case No. 2-RC-2282.

3. Having found that the Respondent was never obligated to bargain with the Union in the engineer-technician unit, we would further find that the Respondent's refusal to furnish the Union with merit review data pertaining to this mixed unit is also not violative of the Act, and would, therefore, also dismiss this related allegation.

Dated, Washington, D. C., June 29, 1966.

NATIONAL LABOR RELATIONS BOARD
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member

Appendix "A", Annexed to Foregoing Decision and Opinions of N. L. R. B.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will bargain collectively, upon request, with Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, as the exclusive representative of our employees in the engineer-technician unit and in the shop-maintenance and clerical-drafting units with respect to rates of pay, wages, and hours of employment, and

other conditions of work, and, if an understanding is reached, embody it in a signed agreement.

We will furnish to said labor organization, upon request, information concerning any personnal action taken, or event occurring, since October 13 or 22, 1964, that is relevant to a determination of the seniority that would be acquired by nonunit personnel, if transferred into the foregoing bargaining units pursuant to applicable contract provisions.

We will disclose to said labor organization, upon request, the merit review evaluation data on which we relied in allocating the two-thirds portion of the merit fund to professional employees in the engineer-technical bargaining unit.

We will disclose to said labor organization, upon request, all data in our possession on which we relied or may have relied in asserting during contract negotiations that the relatively high cost of existing employee benefits is adversely affecting our competitive position or causing us to lose competitive contracts.

We will not offer to strikers special inducements to return to work or threaten them with loss of benefits if they do not return.

We will not, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through represenatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any

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or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

INTERNATIONAL TELEPHONE & TELEGRAPH CORP.
(Employer)

Dated ..... By .....
(Representative) Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102 (Tel. No. 645-3088).

Appendix "B", Annexed to Foregoing Decision and Opinions of N. L. R. B.

(Clerical-Drafting Unit)

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Buyer "A"

Buyer "B"

Buyer "C"

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Planner "A"

Planner "B"

Planner "C"

Technical Clerk "A"

Technical Clerk "B"

Photographer "A"

Photographer "B"

Photographer Helper "A"

Photographer Helper "B"

Secretary

Stenographer "A"

Stenographer "B"

Typist "A"

Typist "B"

Vari-Typist "A"

Vari-Typist "B"

Statistical Typist

Clerk Reproduction "A"

Clerk Reproduction "B"

Clerk Reproduction "C"

Clerk "A"

Clerk "B"

Clerk "C"

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Junior Clerk

Telephone Operator

Senior Designer

Designer

Layout Draftsman "A"

Layout Draftsman "B"

Detailer

Detailer-Trainee

Senior Designer—Telephone

Designer—Telephone

Technical Illustrator (Artist) Senior

Technical Illustrator Senior

Technical Illustrator (Artist)

Technical Illustrator

Appendix "C", Annexed to Foregoing Decision and Opinions of N. L. R. B.

All employees at Respondent's Nutley, New Jersey, plant, in the following classifications, excluding supervisors:

Sr. Laboratory Mechanic

Exp. Tool & Die Maker

Exp. Machinist

Machinist "A"

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Machinist "B"

Inspector "A"

Inspector "B"

Exp. Glassblower

Glassblower "A"

Glassblower "B"

Exp. Engraver

Exp. Sheetmetal Worker

Sheetmetal Worker "A"

Sheetmetal Worker "B"

Sheetmetal Worker "C"

Exp. Painter

Exp. Welder

Welder "A"

Exp. Assembler—Mechanical

Assembler "A"—Mechanical

Exp. Assembled—Vacuum Tube

Mounter Assembler

Mounter Assembler "B"—Vacuum Tube

Exhaust Operator "A"

Exhaust Operator "B"

Wireman "A"

Wireman "B"

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Wireman "C"

Inspector Equipment

Inspector Tester—Transformer

Wireman and Transformer Workers

Inspector—Process

Inspector—Receiving

Stock Clerk "A"

Stock Clerk "B"

Receiving and Shipping Clerk

Warehouseman

Carpenter "A"

Carpenter "B"

Electrician "A"

Electrician "B"

Plumber Mechanic "A"

Pumber Mechanic "B"

Maintenance Mechanic "A"

Maintenance Mechanic "B"

Machine Repairman

Painter "A"

Painter "B"

Maintenance Helper

Cleaner

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Chauffeur

Chauffer's Helper

Aircraft Mechanic

Potter

Helper, Laboratory

Note

There is appended to the foregoing Decision and Order of the N.L.R.B., the full Decision of Trial Examiner Sherman of April 15, 1965 In Re: I.T.T. Federal Laboratories and Local 400, International Union of Electrical, Radio & Machine Workers, A.F.L.-C.I.O. This Decision is printed in full at pages 10a to 63a, *supra*.

APPENDIX E

Opinion of United States Court of Appeals for the Third Circuit (Re: *I.T. T.* v. *N. L. R. B., et al.*)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16012

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO,
Intervenor,

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES,
A DIVISION OF INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Intervenor,

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 28, 1967

Appendix E

Before: HASTIE and SEITZ, *Circuit Judges*; and BODY, *District Judge.*

OPINION OF THE COURT

(Filed July 31, 1967)

By HASTIE, *Circuit Judge.*

This case is here on a petition by International Telephone and Telegraph Corporation to review, and a cross-petition by the National Labor Relations Board to enforce, a decision and order of the Board. 159 N.L.R.B. No. 145. The Board found that the petitioner had committed unfair labor practices within sections 8(a)(5) and (1) of the National Labor Relations Act,[1] (1) by withdrawing recognition from and refusing to bargain with Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, as representative of the professional employees in the engineer-technician unit, (2) by refusing to disclose to the union certain data necessary to the union in the performance of its role as bargaining agent, and (3) by entering into and conducting negotiations with a determination to avoid an agreement. The Board also found that the petitioner had violated section 8(a) (1) of the Act by un-

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[1] 29 U.S.C. § 158

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

lawfully employing threats and promises in soliciting two striking employees to abandon the strike. Accordingly, the order here in controversy was issued requiring the petitioner to cease and desist from those practices and to take appropriate affirmative action, including posting of notices.

In 1951, Local 400 petitioned the Board for a representation hearing to be conducted within the framework of three theretofore-recognized bargaining units of the petitioner's employees; a shop-maintenance unit, a clerical-drafting unit, and an engineer-technician unit. A dispute arose whether the technicians in the engineer-technician unit were professional employees within the terms of the Act and thus should be included in that unit. The Board ruled that the technicians were properly so included, whether "professionals" or not, because of the similiarity of working conditions, integration of work and parallel bargaining history of the technicians and the engineers. The Board also found that professional employees constituted a majority of workers within the unit regardless of classication of the technicians. *Federal Telecommunications Laboratories, Inc.*, 1951, 92 N.L.R.B. 1395.

At that time, the policy of the Board was to deny professionals a separate vote as to their choice of a collective bargaining representative where they constituted a majority of such a mixed unit. Thus, although the engineer-technician unit selected Local 400 as its bargaining representative, no separate vote was ever held among the engineers, despite the petitioner's objection. This was in contravention of section 9(b)(1) of the Act, 29 U.S.C. § 159 (b) (1), which reads in part: "The Board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who

are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

Local 400 was granted recognition and collective bargaining ensued. Thereafter, for thirteen years the petitioner maintained a continuous bargaining relationship with the union as the representative of each of the three units. Bargaining agreements were executed in 1951, 1952, 1954, 1956 and 1959. A Strike Settlement Agreement was entered into in 1961 and expired in September, 1964. Upon failing to reach a new agreement with the petitioner, the union struck on September 9, 1964. Although negotiations continued, no accord was reached.

At this juncture, for the first time since 1951, the representative status of the union was challenged. On October 7, the professional employees filed a decertification petition with the Board, requesting that engineers and chemists no longer be represented by Local 400. One day later, the petitioner filed election petitions for both the mixed unit and the professional employees. At the same time, it notified the union that it was withdrawing recognition from Local 400 as bargaining representative of the professional employees. On October 9, Local 400 filed unfair labor practice charges with the Board alleging the Petitioner's refusal to supply certain data which the union considered necessary for proper collective bargaining and also averring the petitioner's intent to avoid agreement. These charges were later amended to allege as additional wrongs the petitioner's withdrawal of recognition of the union as the representative of the professional employees and certain threats and promises made by the petitioner to specific striking professional employees.

The Board dismissed the election petitions on the ground that they could not be considered pending disposition of the

unfair labor practice charges. Thereafter, the Board handed down the Decision and Order contested here.

WITHDRAWAL OF RECOGNITION OF THE UNION

The Board found that the petitioner's withdrawal of recognition of the union as representative of the professional employees violated sections 8(a)(5) and (1) of the Act. In reaching its decision, the Board assumed that the failure to provide a separate election for the professional employees in 1951 made that election illegal. See *Leedom* v. *Kyne*, 1958, 358 U.S. 184. But to concede that point is not to say that every unit composed of professionals and non-professionals originally formed without a separate election is invalid forever. Though section 9(b)(1) prohibits the Board from designating a mixed unit without holding the requisite election of professionals, nothing in the language of the Act prohibits the relevant parties from maintaining and recognizing such a unit consensually. *Retail Clerks Union Local 324 (Vincent Drugs)*, 1963 144 N.L.R.B. 1247. In our view such a consensual arrangement is presented here. At no time between 1951 and 1964 did either the petitioner or the professional employe challenge the unit or seek its decertification. The petitioner could have brought the question of alleged improper certification to a head immediately by refusing to bargain in 1951 and litigating the issue before the Board and the courts in an unfair labor practice proceeding. More significantly, even after the 1958 decision in *Leedom* v. *Kyne*, *supra*, which put the parties on notice that the original certification was made in error, they negotiated and entered into new contracts in 1959 and 1961 without questioning the composition of the unit. The Board reasonably found that this conduct constituted consent on the part of both parties

to a mixed bargaining unit consisting of professional and non-professional employees. The rationality of that conclusion is further supported by the fact that even before 1951 an engineer-technician group had existed and had functioned as a consensual unit for collective bargaining between the petitioner and the union which then represented the employees. In these circumstances, the error in the original determination of the bargaining unit does not justify the present refusal to bargain with it.[2]

Nor can it be said that the petitioner's refusal to bargain was grounded on and justified by good-faith doubt as to the union's majority within the existing unit. At the time recognition was withdrawn 216 of the 345 engineers had returned to work, but more than a majority of the engineer-technician unit remained on strike. And, as the petitioner has admitted, the filing of a decertification petition by a group within a recognized union is not a valid excuse for refusal to bargain with that union. The Board permissibly found that the petitioner's refusal to bargain with Local 400 as representative of the entire group of employees in the engineer-technician unit constituted an unjustified disruption of the bargaining process violative of sections 8(a)(5) and (1).

Failure to Disclose Data

The bargaining history prior to the strike of September 9, 1964, discloses that the issue of labor costs, especially

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[2] The Board was careful to point out, in footnote 15 of its opinion, that its "holding here is not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time . . . ; now is not an appropriate time because of the Respondent's unremedied unfair labor practices."

Appendix E

FAILURE TO DISCLOSE DATA

The bargaining history prior to the strike of September 9, 1964, discloses that the issue of labor costs, especially fringe benefits, was of vital concern to both the petitioner and the union. The petitioner continually maintained that in order for it to remain "competitive" the cost of fringe benefits must be reduced, and that contracts were being lost because the fringe benefit costs of its competitors were lower. The union requested data showing the relation between fringe benefits and bidding for new contracts and information showing the contracts that had been lost because of high fringe benefit costs. The petitioner suggested that the union "write a letter to the company, and they would give it to counsel for review". Although no letter was written until October 13, four days after the unfair labor practice charges were filed, the petitioner persisted in its refusal to disclose any financial data regarding its competitive position and corresponding labor costs.

Good-faith bargaining requires that relevant factual statements made during the course of collective bargaining be supported, on request, by available proof as to their accuracy. *NLRB* v. *Truitt Manufacturing Co.*, 1956, 351 U. S. 149. Certainly it cannot be contended that the information sought by the union was irrelevant to its function as bargaining agent. Indeed, the petitioner does not deny relevancy. In our view, failure to honor the request for disclosure of relevant data in this case was a clear violation of the Act. *Puerto Rico Telephone Co.* v. *NLRB*, 1st Cir., 1966, 359 F. 2d 983; *Curtiss-Wright Corporation, Wright Aeronautical Division* v. *NLRB*, 3d Cir., 1965, 347 F. 2d 61.

We have considered the petitioner's argument that the union's failure to put its request for information in writing

until after the unfair labor practice charges had been filed shows that the earlier oral requests for such data were not made in good faith and were merely "to set the Company up" for an unfair labor practice charge. This argument is without merit. No rule requires that requests for information be in writing. The fact that no letter was written until October must be considered in the light of various delaying tactics employed by the petitioner, among them a promise that the company comptroller would come to a bargaining session to answer questions pertaining to financial data. The comptroller never appeared.

Finally, the petitioner did not meet its obligation of disclosure by providing some of the requested data. The petitioner was obliged to make full disclosure of the data upon which its assertions were based. *NLRB* v. *Western Wirebound Box Co.*, 9th Cir., 1966, 356 F. 2d 88; *Curtiss-Wright Corporation* v. *NLRB, supra.*

FAILURE TO DISCLOSE BLANKET SENIORITY INFORMATION AS TO NON-UNIT EMPLOYEES.

Under the terms of the collective bargaining agreement, employees not within the bargaining unit could, under certain circumstances, be transferred into the unit, receiving seniority credit for time not within the unit. Thus, the transfer for a non-unit employee could conceivably "bump" a unit employee down the seniority ladder. In fact, such a situation occurred in December of 1963. The union thereafter requested information regarding seniority status of the transferred employee as well as blanket seniority information as to the other employees eligible for transfer into the unit. The company stipulated that the only information the union would receive would be as to employees already transferred, and that this information

would be published in the company's semi-monthly personnel bulletin. This publication was distributed two months after the transfer. The union's request for blanket seniority information was not met until October of 1964. The Board found that failure to provide this information for a nine-month period violated sections 8(a) (5) and (1).

The major question here is whether such information was relevant to the performance of the union's obligations under the Act. We have concluded that knowledge of seniority data of non-unit personnel before their transfer into the unit was imminent has not been shown to have been relevant to the union's performance of its duties. We realize, of course, that a union is entitled to information necessary to prosecute grievances. *NLRB* v. *Acme Industrial Co.*, 1967, 385 U.S. 432. But we see no reason why the petitioner's disclosure obligation cannot be met by furnishing seniority data of an individual non-unit employee shortly before his transfer into the unit. Imparting individual seniority data at this time could not place the union in any worse position than it would be if it was permitted to obtain comprehensive data for all employees eligible before any transfers were contemplated.

Similarly, it has not been established that the union needed such information in order to "administer" the collective bargaining agreement. The Board theorizes that without such information the union cannot perform its function of "counselling and advising unit employees of their rights and status under the contract". But it is not indicated how the rights and status of an employee might be affected before a transfer into the unit should become imminent. Indeed, since transfer cannot occur until certain conditions precedent are met, long-range predictions of transfers must be speculative.

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The case cited to us by the Board for the proposition that the union is entitled to blanket seniority information are inapposite, *NLRB* v. *Gulf Atlantic Warehouse Co.*, 5th Cir., 1961, 291 F.2d 475; *Boston Herald-Traveler Corp.* v. *NLRB*, 1st Cir., 1955, 223 F.2d 58; *NLRB* v. *New Britain Machine Co.*, 2d Cir., 1954, 210 F.2d 61. In those cases, requests for seniority data, limited to unit employees, were linked to wage claims, and thus were "presumptively relevant." *Curtiss-Wright Corporation* v. *NLRB, supra; Boston-Herald-Traveler Corp.* v. *NLRB, supra.* No wage claims supported the demand for blanket seniority data here and the demand covered non-unit employees.

In these circumstances and on the present record we hold that the petitioner's failure for a nine-month period to disclose blanket seniority information concerning non-unit employees who might, at some undetermined time in the future, be transferred into the unit was not an unfair labor practice. However, the union is entitled to be informed of the seinority status of a non-unit employee about to be transferred in order that it may detect possible contract infractions and, if appropriate, institute grievance procedures. We leave open the question whether, on a different showing blanket seniority data for non-unit employees must be supplied.

REFUSAL TO DISCLOSE MERIT-REVIEW EVALUATION DATA.

The collective bargaining agreement provided for merit increases for professional employees. The total sum to be used for such increases was divided into two parts. Two-thirds of it was to be allocated upon the basis of company recommendations as to recipients and the amount each was to receive. Discussions as to these recommendations between the petitioner and the union were mandatory. If

the parties could not agree, the company had the right to put its proposals into effect unilaterally. As to the second part, consisting of the remaining one-third of the total, a board composed of both union and company representatives was to "review" recommendations forwarded by the union. Unresolved disputes as to allocation of this portion of the fund were to be submitted to arbitration.

The union demanded disclosure of the factors that the petitioner had used in recommending a distribution of the first two-thirds of the fund. The petitioner refused to comply with this request. The Board ordered the petitioner to turn over such information. We agree that such data should have been provided.

Since merit payments are in fact "wages", information relating to such payments is "presumptively relevant." *Curtiss-Wright Corporation* v. *NLRB, supra.* The union, under the terms of the collective bargaining agreement, had the right to discuss the recommendations of the petitioner in an effort to influence the petitioner's judgment. We do not see how this prerogative could be exercised effectively without knowing the basis of the petitioner's suggestions. Moreover, the union was entitled to be advised of these factors as a guide to the exercise of its right of recommendation as to the remaining one-third portion of the fund.

The petitioner claims that the union waived its right to such information, citing for this proposition certain bargaining history. Under the 1959 collective bargaining agreement, the petitioner was required to furnish the union with blank evaluation sheets used by the petitioner in preparing recommendations for merit increases. Later bargaining contracts did not require that these sheets be turned over. The petitioner views this as a contractual waiver of the right of the union to have access to relevant data.

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Waiver of a statutory right to information, within the provisions of section 8(d) of the Act, 29 U.S.C. §158(d), must be in "clear and unmistakable language". *Timken Roller Bearing Co.* v. *NLRB*, 6th Cir., 1923, 325 F. 2d 746, *cert denied* 376 U. S. 971. Silence in the bargaining agreement is insufficient to constitute such waiver. Thus, the petitioner will be required to turn over the data relied upon in recommending allocation of the two-thirds portion of the merit fund when the union so requests.

BAD FAITH BARGAINING WITH INTENT TO AVOID AGREEMENT

The Board found that the petitioner violated sections 8(a)(5) and (1) of the Act "by entering into and conducting negotiations with a fixed determination to avoid, rather than reach, an agreement. This court must determine whether that finding is supported by substantial evidence on the entire record. 29 U.S.C. §160(e).

The Board points initially to two incidents involving Carey, the petitioner's labor relations manager, and LaGana, one of the union's chief stewards. In March of 1964, during a conference concerning the resolution of grievances Carey and LaGana became involved in a disagreement as to the substance of a grievance. Carey told LaGana that LGana was "completely and absolutely unreasonable, that the union contract had clauses that management could no longer live with, and in fact, that the company was preparing a set of proposals of such a nature that it would take a fourteen week strike to condition . . . [the union] to accept them, and if Mr. LaGana was on the committee it would take a twenty-eight week strike". During a subsequent argument Carey replied in the affirmative to LaGana's question "you mean you are sending out proposals just like you told us . . . and you are going to put us out in the street for fourteen weeks?"

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As the trial examiner found, negotiations over the new contract followed the course Carey had predicted. The petitioner proposed large reductions in fringe benefits, yet as previously pointed out, refused to substantiate the contention that such reductions were needed in order to maintain its competitive position. Even when the petitioner reduced some of its demands, others were retained as "musts", manifesting a "take-it-or-leave-it" attitude. The dropping of some demands was conditioned on union acceptance of others "if there was no strike".

The petitioner maintains that the events relied upon by the Board are isolated, at most show a "give and take" attitude, and do not show an overall intent to avoid agreement within the meaning of *NLRB* v. *Katz*, 1962, 369 U. S. 736. From the record we cannot say that the Board was arbitrary in its finding. Although we, like a minority of the Board, might have reached a different conclusion given the same facts, our power of review is not such that we may, on the present record, reverse the decision of the Board as inadequately supported by the evidence.

Solicitations of Two Striking Employees to Return to Work

It is undisputed that the petitioner's laboratory director solicited two striking engineers to return to work. Such solicitations were accompanied with promises such as "the company would remember its loyal employees at merit review time" and "if you are one of the first employee(s) to come in during the strike you can expect a raise and a promotion".

The petitioner claims that such events are unrelated to any other unfair labor practice finding and, therefore, no remedial order is warranted. But it is not necessary that

such occurrences be related to other unfair labor practices. *International Ladies Garment Workers Union, AFL-CIO and Twin-Kee Manufacturing Co., Inc.*, 1961, 130 N.L.R.B. 614. And even if such a requirement existed it could not be found on this record that these solicitations were unrelated to the petitioner's withdrawal of recognition from the union as representative of the professional employees. The Board's finding as to illegal solicitation must be upheld.

So much of the Board's order as requires the disclosure of blanket seniority data of non-unit personnel will be set aside. The remainder of the order will be enforced.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 778

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation, WILLIAM P. LAPLANT, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

FRANK W. McCULLOCH, *et al.*, being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 773

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a division of International Telephone and Telegraph Corporation, WILLIAM P. LAPLANT, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

vs.

FRANK W. MCCULLOCH, *et al.*, being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent, Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter referred to as "Local 400", prays that the petition of petitioner,

Professional Employees of ITT Federal Laboratories, a Division of International Telephone and Telegraph Corporation, *et als.*, hereinafter referred to as "Professional Employees" for a writ of certiorari to review two judgments of the United States Court of Appeals for the Third Circuit in Case No. 16,012 entered August 31, 1967, affirming and enforcing an order issued by the National Labor Relations Board on June 29, 1966, and Case No. 15,609 rendered July 31, 1967, affirming a judgment of the United States District Court for the District of New Jersey issued March 29, 1965, be denied.

Counter-Statement of Questions Presented

1. Does the District Court have jurisdiction over the subject matter of an action to review a discretionary administrative determination of the National Labor Relations Board not to proceed with a decertification petition in the face of a pending unfair labor practice complaint alleging a refusal to bargain by the same employer in a recognized bargaining unit in which decertification is sought in a portion of said unit?

2. Is the decision of the Court of Appeals herein in conflict with the holding of this Court in *Leedom* v. *Kyne*, 350 U. S. 184 (1958)?

Counter-Statement of the Case

This is a companion case to *International Telephone and Telegraph Corporation* v. *NLRB* designated as Case No. 772, October Term, 1967, in which a petition for a writ of certiorari was docketed with the Court on October 30, 1967, simultaneous with the docketing of the petition in the instant case, which is designated Case No. 773. The essential facts relating to the bargaining history between Local 400 and respondent International Telephone and

Telegraph Federal Laboratories, a division of International Telephone and Telegraph Corporation, hereinafter interchangeably referred to as "ITT" or the "Company" are set forth in the reply to the petition for certiorari of said companion Case No. 772. There are additional facts pertinent to the instant case which are set forth herein.

During the course of the 1961-1964 collective agreement differences arose between ITT and Local 400 which resulted in the filing of unfair labor practice charges by Local 400 before the NLRB on June 19, 1964 (Exh. A annexed to Affidavit of Laird, Defendant's App. 10b, 11b).* On September 15, 1964, after investigation, the General Counsel of the NLRB issued a complaint against ITT, based on the Local 400 charge, alleging that ITT had failed to bargain with Local 400 in violation of the National Labor Relations Act. While awaiting a hearing on this complaint, a decertification petition was filed by professional employees on October 7, 1964, seeking to eliminate Local 400 as the bargaining agent of a portion of the "Engineer-Technician" unit, purportedly affecting "all professional employees including engineers in all categories, chemists in all categories, and spectroscopists in all categories . . ." (Exh. B annexed to Affidavit of Laird, pars. 5 and 6, Defendant's App. 5b, 12b, 13b).

On October 8, 1964, a new unfair labor practice charge was filed by Local 400 against ITT, which was amended on October 11, 1964, alleging additional unfair labor practices that had occurred since the filing of the original charge (Exhs. C and D annexed to Affidavit of Laird, par. 7, Defendant's App. 5b, 14b, 17b).

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* Reference to defendant's appendix herein is appendix of Local 400 annexed to Local 400's brief before the Court of Appeals. Reference to plaintiff's appendix herein is the appendix of Professional Employees filed with the Court of Appeals.

On October 30, 1964, the Regional Director of the NLRB dismissed the foregoing decertification petition upon the ground that the "petition involves an inappropriate unit" (Exh. E annexed to Affidavit of Laird, par. 6, Defendant's App. 19b). Professional employees' representative sought review of this action by filing a request for review thereof with the NLRB in Washington on November 17, 1964 (Affidavit of Laird, par. 8, Defendant's App. 5b, 18b, 19b).

On November 10, 1964, the General Counsel of the NLRB issued an amended complaint on the later charges and issued an Order consolidating both unfair practice cases for hearing. The amended complaint alleged that ITT had unlawfully refused to bargain with Local 400, by its refusal to bargain, had unlawfully prolonged a strike which had commenced on September 9, 1964, and had interfered with, restrained and coerced its employees in violation of the National Labor Relations Act (Affidavit of Laird, par. 9, Defendant's App. 5b, 6b).

On December 9, 1964, the Board sustained the Regional Director's dismissal of the decertification petition "in view of the pending unfair labor practice complaint . . . alleging that the employer (ITTFL) has violated Section 8(a)-(5) of the Act (refusal to bargain)" (Affidavit of Laird, par. 10, Defendant's App. 6b).

On December 16, 1964, a hearing was commenced before NLRB Trial Examiner Sidney Sherman on the amended and consolidated unfair labor practice complaints. When advised of the dismissal of the decertification petition, the Trial Examiner invited representatives of professional employees to intervene in said proceeding since the company's defense to said complaint, in part, denied it ". . . unlawfully refused to bargain with Local 400 respecting the engineers since the 'Engineer-Technician' unit alleged as appropriate in the amended complaint is an unlawfully con-

stituted unit", the same position taken by professional employees when they filed the decertification petition. Said opportunity to intervene was rejected by representatives of professional employees who advised that in lieu of intervening they intended to seek redress in the courts" (Affidavit of Laird, par. 11, Defendant's App. 6b).

In lieu of participating in the then pending NLRB hearings, professional employees instituted the within action on December 21, 1964 (Plaintiffs' App. 5a, 11a). The complaint alleged, in essence, that the unit combining engineers with technicians was inappropriate and, therefore, the NLRB should not have dismissed the decertification petition but should have directed an election in the unit requested in said petition. The complaint sought a mandatory injunction to declare the "Engineer-Technican" unit invalid and to compel the NLRB to direct an election based upon the decertification petition filed (Complaint, Plaintiff's App. 16a).

As heretofore noted, the appropriateness of the "Engineer-Technician" unit was one of the issues raised in the unfair labor practice proceedings.

On March 29, 1965, the District Court rendered an opinion dismissing the complaint for lack of jurisdiction. The court distinguished the case of *Leedom* v. *Kyne,* 385 U. S. 184 (1958) relied upon by professional employees as the basis for the relief sought, noting, *inter alia,* the pendency before the NLRB of the unit question raised in the District Court litigation and the availability of this forum to resolve the issues raised (Plaintiffs' App. 7a, 8a).

On April 6, 1965, the professional employees filed a petition with the NLRB seeking revocation of certification of Local 400 as the bargaining agent in the "Engineer-Technician" unt (Defendant's App. 20b, 24b).

On June 29, 1966, the Board rendered its decision in the then pending unfair labor practice proceeding in which it held, *inter alia,* that the company had violated Sections 8(a)(1) and (5) of the Act and dismissed the petition to revoke the certification as moot. The Court of Appeals in its opinion rendered July 31, 1967 affirmed the Board's decision as reflected in Case No. 772 herein, and affirmed the decision of the District Court in Case No. 773 the case at bar herein.

Reasons for Denying the Writ

1. The decision of the Court of Appeals in the within case, No. 773, was not in conflict with the holding of this court in *Leedom* v. *Kyne, supra.* The argument in support of such conclusion has been set forth in detail in the reply to petition for certiorari filed in Case No. 772 and we respectfully refer the court to said argument as it applies herein in lieu of burdening the court with a repetition of our contentions on this question.

2. The District Court is without jurisdiction over the subject matter of the action brought by the professional employees in the instant case and, therefore, it did not err in dismissing the complaint and the Court of Appeals did not err in affirming the order of the District Court.

As noted, the District Court dismissed the complaint seeking a mandatory injunction to compel the NLRB to proceed with the decertification petition and direct an election pursuant thereto. The Court distinguished the instant case from *Leedom* v. *Kyne, supra,* noting the narrow confines of this decision, the procedural limitations therein expressed, and the availability of a forum, the NLRB, to air the issues raised herein, which forum was established by Congress, and pursuant thereto had the expertise to decide the issue in controversy.

It is a basic rule that the Federal District Court lacks jurisdiction to review and set aside a Board decision in a representation case, except where the determination complained of clearly transgresses a mandatory direction of the act or violates constitutional protections. *Boire* v. *Greyhound Corp.*, 376 U. S. 473 (1964); *Boire* v. *Miami Herald Publishing Co.*, 343 F. 2d 17 (C. A. 5, 1965); *Milk and Ice Cream Drivers and Dairy Employees Union Local 98* v. *McCulloch*, 306 F. 2d 763 (C. A. D. of C. 1962); *Leedom* v. *IBEW*, 278 F. 2d 237 (C. A. D. of C. 1960); *International Association of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514 (C. A. D. of C. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (C. A. D. of C. 1959), cert. den. 359 U. S. 1011 (1959); *NLRB* v. *Burns*, 346 F. 2d 897 (C. A. 8, 1965); *Boire* v. *Miami Herald Publishing Co.*, 343 F. 2d 17 (C. A. 5, 1965). See also *Leedom* v. *Kyne, supra; McCulloch* v. *Sociedad National*, 372 U. S. 10 (1963); *Miami Newspaper Printing Pressmens Association, Local 46* v. *McCulloch*, 322 F. 2d 993 (C. A. D. of C. 1963). Conversely, the foregoing cases also establish that the District Courts may not review representation matters "in the wide area of determinations which depend on the Board's expertise and discretion. *International Association of Tool Craftsmen* v. *Leedom, supra.*

Professional employees emphasize that the Board's determination to dismiss the decertification petition because of the pendency of the unfair labor practice charges was improper, because of the claimed application of *Leedom* v. *Kyne, supra.* However, the administrative determination not to process the decertification petition at the time presented, in light of the pending unfair labor practice charges, fell within the "wide area of determinations which depends on the Board's expertise and discretion." *Tool Craftsmen, supra.* Moreover, one of the essential ingredi-

ents of *Kyne*, the lack of another forum to hear the issue, is absent in the instant case. The available forum was the NLRB in deciding the unfair practice complaint.

In *Suprenant* v. *Alpert*, 318 F. 2d 396 (C. A. 1, 1963) a suit for a mandatory injunction was brought to compel the Regional Director of the Board to process a representation case to completion which had been halted by application of the "blocking charge" doctrine. In considering the Board's "blocking charge" principle the court said:

> "There is no provision in the statute, or even any regulation, which expressly authorizes such action, but, concededly, the Board has followed this 'blocking charge' procedure from the beginning. *United States Coal & Coke Co.*, 1937, 3 NLRB 398; *Third Annual Report of the NLRB* (1939), 143. So far as we can discover it has never been judicially overturned. See e.g., *NLRB* v. *Auto Ventshade, Inc.*, 5 Cir., 1960, 276 F. 2d 303; *Pacemaker Corp.* v. *NLRB*, 7 Cir., 1958, 260 F. 2d 880; *NLRB* v. *Trimfit of California, Inc.*, 9 Cir., 1954, 211 F. 2d 206."

The court further noted that the control of election proceedings, including the determination of the steps necessary to conduct an election fairly, the timing of an election, what constitutes fair surrounding circumstances, etc., were matters entrusted by Congress to the Board alone. *Cf. NLRB* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226 (1940); *NLRB* v. *Fresh'nd-Aire Co.*, 226 F. 2d 737 (C. A. 7, 1955); *NLRB* v. *Shirlington Supermarket, Inc.*, 224 F. 2d 649 (C. A. 4, 1955), cert. den. 350 U. S. 914; *NLRB* v. *Consolidated Machine Tool Corp.*, 167 F. 2d 470 (C. A. 2, 1948).

The court concluded that the Board's determination in *Suprenant* was one of discretion, subject to ordinary re-

view, as distinguished from the clear and mandatory statutory prohibition which the Board conceded it did not follow in *Leedom* v. *Kyne*. In conclusion the court said:

> "What appellant is asking is that the district court, in effect, supplant the Board's expertise. This cannot be done. *International Ass'n of Tool Craftsmen* v. *Leedom*, D. C. Cir., 1960, 276 F. 2d 514, cert. den. 364 U. S. 815; *Milk and Ice Cream Drivers Union Local 98* v. *McCulloch*, D. C. Cir., 1962, 306 F. 2d 763. It would seem almost elementary that appellant's claim of hardship must fall upon our deaf ears. *Myers* v. *Bethlehem Shipbuilding Corp.*, 1938, 303 U. S. 41."

Leedom v. *Kyne* is inapplicable to the instant case. In the instant case the Board has exercised its discretion within its jurisdiction as distinguished from entering an order in excess of its delegated powers and contrary to a specific prohibition of the statute. The "blocking charge" principle which is at the heart of the Board's determination to dismiss the petition, is not contrary to any clear, mandatory prohibition in the statute. Moreover, other means exist to effect review of the Board's final determination in the unfair practice proceeding under the review procedures specifically provided in the statute.

Professional employees contend that dismissal of the decertification petition foreclosed their right to be heard on the unit issue because they were not parties to the unfair practice proceedings. However, as conceded, they were offered an opportunity to intervene and participate in said proceeding as it related to the unit question. The decision not to participate was professional employees'. Although they may not have wanted to participate in the forum provided, it was available, and they cannot now complain that they were denied a right to be heard. The claimed appli-

cation of the 9(b)(1) proviso could have and should have been aired by the professional employees before the Board when the opportunity was offered to them by the Trial Examiner during the pendency of the unfair labor practice proceedings. Such participation would have enabled them to seek review of the Board's decision before the Court of Appeals under section 10(f) of the act, as an aggrieved person. See *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933 (C. A. 5 1959).

Moreover, the professional employees were joined as respondents in the appeal from the Board's decision, were heard before the Court of Appeals on the argument, and have sought *certiorari* in said Case No. 772 in which they have argued their claim of application of *Leedom* v. *Kyne, supra.*

Accordingly, the very basis of the Court of Appeals affirmance of the District Court, the inapplicability of *Leedom* v. *Kyne, supra,* because of the availability of another forum is significantly appropriate herein.

Local 400 contends that the action instituted before the District Court was in effect an attempt to seek judicial review of the Board's decision to dismiss the decertification petition, which review is beyond the jurisdiction of the District Court, since the judicial forum may not be substituted for the administrative forum where the issue involved is the exercise of discretionary authority vested in the administrative tribunal. Moreover, since there was a forum available to litigate the unit question raised by the decertification petition, with the right of review in the courts after administrative determination, this was the forum that should have been pursued to litigate the unit issue and the District Court was without jurisdiction to entertain the complaint filed. Significantly, professional employees did litigate the unit issue in the Court of Appeals on the re-

view of the Board's decision in the unfair practice proceeding and has sought *certiorari* from this court to review the decision of the Court of Appeals which rejected professional employees contention as to the bargaining unit.

CONCLUSION

For the reasons heretofore set forth, Local 400 submits that the petition for the writ of certiorari herein should be denied.

Respectfully submitted,

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Attorneys for Respondent, Local 400 International Union of Electrical Radio & Machine Workers, AFL-CIO.

SIDNEY REITMAN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 773

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, ET AL., PETITIONERS

v.

FRANK W. MCCULLOCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 8a–9a, 102a–114a) have not yet been officially reported. The opinion of the district court (Pet. App. 1a–6a) is unreported. The underlying decision and order of the Board (Pet. App. 64a–100a) are reported at 159 NLRB No. 145.

JURISDICTION

The decisions of the court of appeals were entered on July 31, 1967 (Pet. App. 8a, 102a). The petition for a writ of certiorari was filed on October 30, 1967.

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The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petition seeks review of actions taken by the court of appeals in two companion cases. In the first case (No. 16012), the court enforced an order of the National Labor Relations Board requiring the employer to bargain with respect to a unit of employees which both the employer (who was a party to the court of appeals proceeding) and petitioner employees (who intervened in that proceeding) contended was improperly constituted under the National Labor Relations Act. In the second case (No. 15609), the court of appeals affirmed the judgment of the district court, dismissing for lack of jurisdiction, a suit brought by petitioner employees seeking in the main review of the identical issue involved in No. 16012. The following questions are presented:

1. Whether the court of appeals properly sustained the Board's conclusion that, in the circumstances of this case, the employer was not justified in withdrawing recognition from a bargaining unit which it had recognized for more than 13 years, even though the Board's original certification of that unit may have been invalid.[1]

[1] The same question is presented by the employer's petition in *International Telephone and Telegraph Corp.* v. *National Labor Relations Board, et al.*, No. 772, this Term. Since the arguments advanced by petitioners with respect to that question are essentially the same as those advanced by the employer in No. 772, we shall not deal with that question here but respectfully refer the Court to our opposition in No. 772 (a copy of which has been served on petitioners).

2. Whether the court of appeals properly concluded that Congress had provided petitioner employees with an available forum, *i.e.*, the Board, with review in the court of appeals, for litigation of the matter complained of, and thus that district court jurisdiction was lacking.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition, pp. 3–4.

STATEMENT

As more fully set forth in the Board's brief in opposition in No. 772, this Term, a companion case, in 1951 the Board, after an election, certified Local 400, International Union of Electrical, Radio & Machine Workers, AFL–CIO, as the representative for an engineer-technician unit which consisted of both professional and non-professional employees of the Company; the election did not afford the professional employees the opportunity, as provided for in Section 9(b)(1) of the Act, to vote separately on whether they desired to be grouped in a mixed bargaining unit with non-professional employees. *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395. Thereafter, the Company and Local 400 entered into a series of agreements covering the engineer-technician unit, the last of which expired by its terms on September 9, 1964. In the course of the 1964 negotiations for a new contract, Local 400 filed an unfair labor practice charge against the Company, alleging that it was not bargaining in good faith (Pet. App. 2a). On October 7, 1964, after

a complaint had issued on that charge, certain employees in the engineer-technician unit (petitioners here) filed with the Board a petition seeking an election for the purpose of severing the professional employees from the remainder of the unit. The next day the Company formally withdrew recognition from Local 400 as the representative of the engineer-technician unit, and filed two petitions of its own with the Board seeking representation elections involving that unit. Local 400 then filed additional unfair labor practice charges against the Company, alleging that the withdrawal of recognition constituted a further unlawful refusal to bargain. The outstanding complaint was amended to include this charge. The petitions filed by the employees, and the two filed by the Company, were dismissed by the Board because of the pendency of the unfair labor practice proceeding against the Company (Pet. App. 2a–3a).

On December 16, 1964, at the opening of the unfair labor practice proceeding, the Trial Examiner telephoned counsel for petitioner employees, informed him of the status of the proceeding and the issues involved,[2] and invited him to intervene on behalf of his clients. He declined to participate in the Board proceeding, but instead filed a suit in the United States District Court for the District of New Jersey (Pet. App. 3a–4a). By their complaint, petitioners sought to have the district court set aside the Board's 1951 bargaining unit certification, or, in the alternative, set

[2] The Company, in its answer, had specifically alleged that the engineer-technician unit was an illegally constituted unit (Pet. App. 3a).

aside the Board's order dismissing their decertification petition. The Board moved to dismiss the complaint on the ground, *inter alia,* that the district court lacked jurisdiction over the subject matter of the action (Pet. App. 4a).

After a hearing, the district court dismissed the complaint on the ground of lack of jurisdiction (Pet. App. 1a–6a). The court, noting that Board representation determinations are generally not reviewable by district courts, concluded that the instant case did not fall within the limited exception created in *Leedom* v. *Kyne,* 358 U.S. 184 (see Gov't Br., No. 772, pp. 11–12). This is so, the court pointed out, since in *Kyne* the plaintiffs had no other adequate means of obtaining review of their contentions, while here "plaintiffs herein have refused to participate in the Board proceedings where their entire position could be aired and appropriate appeal remedies [would be] available" (Pet. App 5a).[3]

Thereafter, the Board decided the unfair labor practice charges against the Company. The Board sustained the allegations of the amended complaint, specifically rejecting the Company's contention that it was entitled to withdraw recognition from Local

[3] In explaining its reasons for dismissal for want of subject matter jurisdiction "at this time," the district court stated (Pet. App. 6a): "By allowing a group of plaintiffs to foist jurisdiction on the Court where it is not otherwise present by claiming to be deprived of certain statutory rights, the Court would invade an area which Congress intended and which properly belongs under the control and expertise of the Board. The *Kyne* exception is a narrow one and cases claiming the benefit thereof must clearly and squarely fall within the procedural ambit delineated in that decision."

400, insofar as the engineer-technician unit was concerned because of the possible invalidity of Local 400's 1951 certification (Pet. App. 64a–100a). The Company petitioned the court of appeals to review the Board's decision and order, and the court set that case for argument with the appeal that petitioner employees had taken from the district court's dismissal of their suit. The employees also intervened in the Company's proceeding to review the Board's decision and order, and were permitted to file a brief and to present oral argument in that case.

The court of appeals, in the proceeding brought by the Company, sustained the Board's findings and conclusions, and enforced its order with a minor modification (Pet. App. 101a–114a). The court also affirmed the district court's dismissal of the suit brought by petitioner employees, stating (Pet. App. 9a):

> In view of the fact that appellants had an available forum, the National Labor Relations Board, in which to litigate the matter of which they complained, with a right to review by this court, the Supreme Court's decision in *Leedom* v. *Kyne* * * * does not support the claimed jurisdiction of the district court to entertain this complaint. In these circumstances, the judicial forum could not properly be substituted for the administrative. Hence, the dismissal of the action by the district court was proper.

ARGUMENT

The basic question which petitioners present is whether, under *Leedom* v. *Kyne*, 358 U.S. 184, they were entitled to obtain district court review of the

validity of the bargaining relationship established between the Company and Local 400, as the representative of the engineer-technician unit. But here the court of appeals sustained that relationship, at least for the present, in a proceeding brought by the Company to review the Board's unfair labor practice findings. Petitioners had an opportunity to participate before the Board and in fact participated in the court of appeals in the litigation of that precise question. Regardless, then, of the correctness of the district court's dismissal of petitioners' action, the central question which they sought to raise was resolved against them, by the same appellate court to which they took an appeal, in a companion case in which they participated. Thus, they were hardly prejudiced by the district court's action.

Moreover, the district court's dismissal of petitioners' suit was proper. As the court of appeals correctly pointed out (Pet. App. 9a), the situation here is distinguishable from that involved in *Leedom* v. *Kyne*. In that case, the Court emphasized that the plaintiffs had "no other means within their control * * * to protect and enforce [the] right" which Congress has given professional employees (358 U.S. at 190). Here, on the other hand, petitioners could have intervened and participated in the unfair labor practice proceeding before the Board—a proceeding in which the validity of the 1951 certification was a central issue.[4] As intervenors before the Board, they would have been entitled to the rights of a party to the pro-

[4] Indeed, the Trial Examiner specifically invited their intervention (*supra*, p. 4).

ceeding. NLRB Rules and Regulations, 29 C.F.R. 102.65(b); see *Potter* v. *Castle Construction Co.*, 355 F. 2d 212, 216 (C.A. 5); *Gary Steel Products Corp.*, 144 NLRB 1160, n. 1. And, if the Board's order proved to be adverse to their position, petitioners would have had standing, as persons aggrieved by a final agency order, to seek judicial review in the court of appeals, under Section 10(f) of the Act. *Shoreline Enterprises of America, Inc.* v. *National Labor Relations Board*, 262 F. 2d 933, 936–937 (C.A. 5). There is thus no justification for extending the limited exception recognized in *Kyne* to a situation where the statutory review procedure established by Congress is readily available.

Finally, petitioners, no less than the Company, accepted and acted under the bargaining relationship established by the Board's 1951 certification for an extended period of time. At least after the decision in *Leedom* v. *Kyne* in 1958, the professional employees were on notice that the original certification of Local 400 as the representative of the engineer-technician unit was of questionable validity, in light of this Court's construction of Section 9(b)(1) in that case. Yet they did not seek decertification at any time prior to 1964, when the Company and Local 400 were engaged in an unfair labor practice dispute before the Board regarding the very issue which petitioners sought to raise in the district court—the validity of the existing bargaining relationship. In these circumstances, it does not appear improper to require petitioners to await resolution of the unfair labor practice proceeding and dissipation of any unfair labor practices found before

allowing them to proceed with steps which might lead to decertification of Local 400 as their representative.[5] Dismissal of petitioners' suit by the district court was thus proper, and no issue warranting review by this Court is presented.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

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[5] As the court of appeals noted, its "decision in no way affects the right of [petitioners] to seek the removal of the union as their bargaining representative by filing another decertification petition * * * after the unfair labor practices shall be remedied" (Pet. App. 9a; see Gov't Br., No. 772, p. 12).

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